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No. 04-5- JUN 25 2004

In The
Supreme Court of the United States

THE DOE RUN RESOURCES CORPORATION,
DR ACQUISITION CORPORATION,
and MARVIN K. KAISER,

Petitioners,

vs.

THE HONORABLE MARGARET M. NEILL,
PRESIDING JUDGE, TWENTY-SECOND JUDICIAL
CIRCUIT, CITY OF ST. LOUIS, MISSOURI,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a state court deny civil defendants due process under the Fourteenth Amendment of the United States Constitution by summarily prohibiting defendants from relying upon post-petition affidavit evidence to prove the falsity of pleaded venue allegations, even though defendants have an independent, state-created right to present such affidavits to challenge the propriety of venue?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

The Doe Run Resources Corporation, DR Acquisition Corporation, and Marvin K. Kaiser, *Petitioners*;

The Honorable Margaret M. Neill, Presiding Judge, Twenty-Second Judicial Circuit, City of St. Louis, Missouri, *Respondent*; and

Bruce C. Clark, Ira L. Rennert, The Renco Group, Inc., Fluor Corporation, Leslie G. McCraw, A.T. Massey Coal Company, Doe Run Investments Holding Company, and Homestake Lead Company of Missouri, all of whom were Relators in the court below.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Petitioners state that: (1) the parent corporation of The Doe Run Resources Corporation is DR Acquisition Corporation; (2) the parent corporation of DR Acquisition Corporation is The Renco Group, Inc.; and (3) no publicly held company owns more than 10% of the shares, issued and outstanding, of either The Doe Run Resources Corporation or DR Acquisition Corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners The Doe Run Resources Corporation, DR Acquisition Corporation, and Marvin K. Kaiser, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Missouri.

CITATION OF REPORTS OF OPINIONS ENTERED IN THE CASE

The opinion of the Supreme Court of Missouri ("Missouri Supreme Court") is reported at *State of Missouri, ex rel., The Doe Run Resources Corp. v. Neill*, 128 S.W.3d 502 (Mo. en banc 2004). Appendix ("App.") 1. The order of the Missouri Supreme Court overruling Relators' Motion for Rehearing is also reported at 128 S.W.3d 502. App. 27.

The now-vacated opinion of the Court of Appeals for the Eastern District of Missouri ("Missouri Court of Appeals") is reported at *State of Missouri, ex rel., The Doe Run Resources Corp. v. Neill*, No. ED81573, 2003 Mo. App. LEXIS 745 (Mo. Ct. App. May 20, 2003). App. 13. The order of the Missouri Court of Appeals granting a preliminary writ of prohibition is unreported. App. 11.

The order of the Twenty-Second Judicial Circuit for the City of St. Louis, Missouri, in the related underlying case, *Doyle v. Fluor Corp.*, No. 012-8641 (22nd Jud. Cir. Mo. Jul. 16, 2002), is unreported. App. 58.

BASIS FOR SUPREME COURT JURISDICTION

By a vote of 4-3, the Supreme Court of Missouri entered its judgment on February 10, 2004. App. 1-10.

Petitioners The Doe Run Resources Corporation, DR Acquisition Corporation, and Marvin K. Kaiser (collectively "Doe Run"), seek review of that judgment on a writ of certiorari.

On February 24, 2004, Doe Run timely filed a motion for rehearing in the Missouri Supreme Court. App. 28-34. On March 30, 2004, the Missouri Supreme Court entered an order overruling the motion for rehearing. App. 27. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . [.]" U.S. CONST., amend. XIV, § 1.

Missouri Revised Statutes Section 509.290 provides in relevant part: "1. The following objections and other matters may be raised by motion whether or not the same may appear from the pleadings and other papers filed in the cause: . . . (3) Improper venue;. . . . 2. The grounds of any of the above may be supplied by affidavit and may be controverted by opposing affidavit. . . . "

STATEMENT OF THE CASE

This case finds its nascency in an underlying Missouri state court case pending in the Circuit Court for the City of St. Louis, Missouri, and titled *Doyle v. Fluor Corp.*, No. 012-8641 ("the *Doyle* case"), in which plaintiffs have asserted multiple environmental torts against Doe Run and other parties concerning emissions in Herculaneum, Jefferson County, Missouri. App. 2, 14-15, 58. Plaintiffs initially filed their claims in 1995 in the Circuit Court for Jefferson County, proceeded with nearly six years of discovery, obtained more than 69,000 documents from Doe Run as part of discovery, were denied class certification for their claims, voluntarily dismissed their Jefferson County case, and then, in July 2001, filed the underlying *Doyle* case in St. Louis. App. 14-15.

After Doe Run filed a motion to dismiss the *Doyle* case for improper venue, plaintiffs amended their petition a second and third time in late 2001 to assert claims against Marvin Kaiser ("Kaiser"), Chief Financial Officer for Doe Run, and the only one of Doe Run's over 1400 Missouri employees who lived in St. Louis City at the time of the filing of the second and third amended petitions. App. 15-16, 59-60. Kaiser's residency in St. Louis City was admittedly the only alleged nexus with the City for purposes of venue. App. 2, 16-17, 36. Doe Run moved to dismiss or transfer the case, contending that venue was improper because plaintiffs had pretensively joined Kaiser and could not state a claim against him. App. 3, 16-17, 59-60. In support of its motion and pursuant to its statutory rights and controlling Missouri law, Doe Run submitted multiple sworn affidavits from its employees, including Kaiser, to prove that the facts pleaded in plaintiffs' petition against Kaiser were in fact false, and that venue was therefore

improper. App. 6, 30-31, 36-37, 49-50, 60. On July 16, 2002, Respondent Hon. Margaret M. Neill ("Neill"), then Presiding Judge of the St. Louis City Court, denied Doe Run's motion and determined that venue was proper in the City. App. 16, 63-64.

Doe Run subsequently challenged Neill's venue determination in the Missouri Court of Appeals. App. 16. The Court of Appeals agreed with Doe Run that venue was improper, granted a preliminary order in prohibition barring Neill from taking any further action other than transferring the *Doyle* case to a proper venue, and made that order permanent in a unanimous opinion and order of May 20, 2003. App. 11-26, 35. The Missouri Supreme Court subsequently agreed to hear the case, and thereby vacated the Court of Appeals' prior opinion and order. App. 35.

On February 10, 2004, by a vote of 4 to 3, the Missouri Supreme Court denied Doe Run's request for a permanent writ of prohibition and quashed the preliminary writ previously issued. App. 1-10. In its opinion, the Missouri Supreme Court majority held that Doe Run had failed to prove that plaintiffs in the *Doyle* case pretensively joined Kaiser. App. 6-7. The Missouri Supreme Court wholly disregarded the sworn affidavit evidence submitted by Doe Run, concluding that such affidavits "were not made until after the plaintiffs filed their petition," and therefore could not be used to evaluate whether joinder was pretensive and venue improper. App. 6-7.

Doe Run timely filed a motion for rehearing before the Missouri Supreme Court. App. 28-34. In its rehearing papers, Doe Run contended that the Missouri Supreme Court's summary rejection of and refusal to consider Doe

Run's sworn affidavits not only violated Doe Run's statutory rights and constituted a reversal of established Missouri law, but also denied Doe Run "the opportunity to be heard and present evidence on the question of whether venue was established by the pleading of false facts," thereby violating the Due Process Clause of the Fourteenth Amendment of the United States Constitution. App. 31, 52-55. Doe Run additionally asserted that the Missouri Supreme Court's opinion disallowed the only competent means by which Doe Run could exercise its state-created right to challenge the falsity of the pleaded venue allegations, thereby leaving Doe Run without an effective remedy for its right, in further violation of the Due Process Clause. App. 53-54. Doe Run specifically noted that the Missouri Supreme Court first denied due process with its February 2004 ruling, and, as such, Doe Run's claim of constitutional error was preserved by presenting the error to the Missouri Supreme Court on application for rehearing. App. 54 (citing *Saunders v. Shaw*, 244 U.S. 317, 320 (1917)). On March 30, 2004, the Missouri Supreme Court overruled Doe Run's motion for rehearing, without commenting on the federal constitutional issues raised by Doe Run. App. 27.

The case presents substantially important federal questions about the minimal Due Process requirements governing judicial deprivations of state-created rights and, in particular, the procedural restrictions associated with state venue issues. Specifically, the case addresses whether a state court violates the Due Process Clause of the Fourteenth Amendment by summarily foreclosing civil defendants from exercising their statutory rights to challenge the falsity of pleaded venue allegations through the submission of post-petition affidavit evidence. Doe Run

asks that this Court grant its petition for a writ of certiorari to conform the Missouri Supreme Court decision to existing Supreme Court authority, to clarify the minimal Due Process requirements attendant to state venue restrictions, and to correct a result that, if undisturbed, will lead to civil defendants being wrongfully denied any substantive opportunity to challenge false venue pleadings.

REASONS FOR GRANTING THE PETITION

I. The Missouri Supreme Court Has Decided an Important Issue of Federal Constitutional Law that Conflicts with Supreme Court Precedent and Fundamental Fairness Principles Under the Due Process Clause of the Fourteenth Amendment.

Procedural due process and principles of fundamental fairness under the Fourteenth Amendment to the Constitution of the United States require that an individual be given a full and fair opportunity to be heard where one's protectible liberty or property interest is at stake. *See Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). Thus, when a state supreme court denies a civil defendant the opportunity to present evidence in defense of a claim, due process is denied. *See Saunders v. Shaw*, *supra*, 244 U.S. at 320. Missouri state statute and case law embody these Constitutional principles in the context of state venue rights, by granting civil defendants the right to present post-petition affidavit evidence to contravene false venue allegations. MO. REV. STAT. § 509.290; MO. R. CIV. P. 55.28; *Glick v. Ballentine Produce, Inc.*, 396 S.W.2d 609, 612-613 (Mo.

1965); *Lichterman v. Crockett*, 331 S.W.2d 607, 608-609 (Mo. 1960). The instant Missouri Supreme Court decision wholly disregards civil defendants' rights to be heard in this regard and amounts to a categorical and arbitrary abrogation of a state-created right, in violation of the Due Process Clause.

Notably, exercise of Supreme Court jurisdiction over the matter is proper even where the petition for rehearing was summarily denied without reference to the federal question, as in the instant case. *See Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 366-367 (1932); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930); *Saunders v. Shaw*, *supra*, 244 U.S. at 320; *cf. Ohio ex rel. Bryant v. Akron Park Dist.*, 281 U.S. 74, 79 (1930). As discussed *supra*, Doe Run timely raised its constitutional objections at the very first opportunity in its motion for rehearing. App. 31, 52-55. This Court has repeatedly held that federal claims are adequately and timely presented, even if only first raised on rehearing, "when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980); *see also Richards v. Jefferson Co., Ala.*, 517 U.S. 793, 797 n.3 (1996); *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-678 (1930). This was clearly the case here, where the Missouri Supreme Court suddenly and surprisingly reversed a long-established course of accepting post-petition affidavits. App. 6-7, 30-31, 44-52; *Glick v. Ballentine*, *supra*, 396 S.W.2d at 612-613; *Lichterman v. Crockett*, *supra*, 331 S.W.2d at 608-609. Thus, the Constitutional issue at stake in this proceeding is properly before this Court.

This Court has repeatedly stated that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In fact, "some form of hearing is required before an individual is finally deprived" of a protectible interest under the Due Process Clause. *Mathews v. Eldridge*, *supra*, 424 U.S. at 333; *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974); *see also Phillips v. Comm'r*, 283 U.S. 589, 596-597 (1931); *Dent v. West Virginia*, 129 U.S. 114, 124-125 (1889). Whereas notice is required to give the defendant the opportunity to *prepare* a defense, "the purpose of a hearing is to afford him the chance to *present* that defense." *Wolff v. McDonnell*, *supra*, 418 U.S. at 581 (Marshall, J., dissenting) (emphasis added).

The Missouri Supreme Court's February 10, 2004 decision arbitrarily prohibited Doe Run from exercising its legal rights to present a basic defense to false pleading allegations, amounting to a complete reversal of Missouri law and a contravention of the dictates of *Saunders v. Shaw*, *supra*, and *Wolff v. McDonnell*, *supra*. Under Missouri statute and established case law, civil defendants like Doe Run have the right not to be subjected to suit in a county where no defendant resides and where the plaintiff's claim did not accrue, a right which cannot be defeated by false pleading. *See* MO. REV. STAT. § 508.010 (state venue statute applicable here). The Missouri Supreme Court has long recognized that a plaintiff cannot "by stating a paper case against the resident defendant, force a nonresident to submit to the jurisdiction of the court, when in truth and in fact the plaintiff had no cause of action against the resident defendant." *Lichterman v.*

Crockett, *supra*, 331 S.W.2d at 608-609; *accord Glick v. Ballentine*, *supra*, 396 S.W.2d at 612. This right is a hollow one, however, if defendants are denied the means of proving that "in truth and in fact the plaintiff had no cause of action against the resident defendant." *Id.* The Missouri Supreme Court's holding that Doe Run's post-petition affidavits are to be completely disregarded accomplishes exactly that. It takes out of defendants' hands the principal tool that defendants have to prove the falsity of the facts pleaded: sworn testimony, given by affidavit, that the pleaded facts are false.

Affidavits of the kind at issue here by definition cannot be prepared until after a petition is filed purporting to assert a claim against the resident defendant. Indeed, until the false pleading is filed, the defendant has no knowledge of what claim is to be made against him or her, and no reason to prepare an affidavit refuting those facts. To disregard those affidavits as prepared too late because they are prepared after the petition, then, is to deny the defendant the means of asserting his or her state-created rights to contest the falsity of the pleaded venue allegations.[1] Prior to the instant decision, Missouri statute permitted the submission of and reliance upon post-petition affidavits, which were consistently and repeatedly

[1] Clearly, it would be another matter entirely if the post-petition affidavits were actually considered and analyzed by the court below but ultimately deemed insufficient to rebut plaintiffs' venue allegations or other evidence relied upon by plaintiffs. At least in that instance, the state court would have given defendants their due process opportunity to be heard. This is not the case here, where, although the Missouri Supreme Court evaluated plaintiffs' allegations and evidence, it summarily disregarded Doe Run's post-petition affidavits strictly on the basis of their date of signature, rather than their actual substantive content. App. 6-7, 49.

considered by the Missouri Supreme Court in its evaluation of venue. *See, e.g., Glick v. Ballentine, supra,* 396 S.W.2d at 612-613; *Lichterman v. Crockett, supra,* 331 S.W.2d at 608-609; *Frank v. Sinclair Ref. Co.,* 256 S.W.2d 793, 795, 799 (Mo. 1953). Letting the Missouri Supreme Court's decision stand yields the classically disfavored "right without a remedy," which is "like a bell without a clapper – hollow and empty." George E. Curry, *Fair Housing Next on Civil Rights Map,* CHI. TRIB., Mar. 28, 1988, at 4M (quoting Sen. Edward W. Brooke, R-MA); *see also Guardian Ass'n v. Civil Serv. Comm'n,* 463 U.S. 582, 626 (1982) (Marshall, J., dissenting) ("[A] right without an effective remedy has little meaning."); *Peck v. Jenness,* 48 U.S. 612, 623 (1849) ("A legal right without a remedy would be an anomaly in the law."). The *Wolff* and *Saunders* decisions together stand for the proposition that such a denial of a defendant's opportunity to be heard and to present evidence on a material question, even where the right is a creature of state law, operates as a denial of due process. *See Wolff v. McDonnell, supra,* 418 U.S. at 557-558; *Saunders v. Shaw, supra,* 244 U.S. at 320.

To be sure, "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge, supra,* 424 U.S. at 334 (quoting *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961)). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* (quoting *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)). In determining what specific process is due under the Fourteenth Amendment, the *Mathews* Court identified three principal factors for consideration: (1) the private interests at stake in a governmental decision; (2) the risk of erroneous deprivation of

such interest through the procedures used, and the probable value of additional procedural safeguards; and (3) the governmental interests involved, including the fiscal and administrative burdens that additional procedures would entail. *Id.* at 334-335. Although *Mathews* specifically addressed governmental deprivation of property interests, this Court has applied the same criteria to the deprivation of liberty interests and even where the interests at issue are created under state law:

> "This analysis as to liberty parallels the accepted due process analysis as to property. The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests. . . . [A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government."

Wolff v. McDonnell, *supra*, 418 U.S. at 557-558; *see also Sandin v. Conner*, 515 U.S. 472, 483-484 (1995) ("Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause."); *Meachum v. Fano*, 427 U.S. 215, 226 (1976) ("The liberty interest in *Wolff* had its roots in state law, and the minimum procedures appropriate under the circumstances were held required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.") (internal quotations omitted).

The Missouri Supreme Court's decision on Doe Run's motion for rehearing failed to incorporate any of the three *Mathews* criteria. If it had, the Missouri Supreme Court would have had to admit that its February 10, 2004

decision denied Doe Run due process under the Fourteenth Amendment. Here the private interest is significant and valuable: a civil defendant's right to offer and rely upon evidence proving that the venue allegations of the pleader are false and thereby protecting the defendant's right to proper venue. The Missouri Supreme Court itself has previously acknowledged "the valuable rights conferred upon litigants" by Missouri venue laws. *Lichterman v. Crockett*, *supra*, 331 S.W.2d at 608. The risk of erroneous deprivation here is absolute: barring defendants from relying upon post-petition affidavits entirely obviates their ability to contest venue on factual grounds. Moreover, the value of permitting defendants to present such affidavits is considerable, given that an improperly sited case may be moved to a proper venue based on the defendants' affidavit evidence. Finally, the government interest in delaying or denying consideration of the affidavits is *de minimis*; the burden of considering defendants' affidavits is insubstantial and is part and parcel of the role of the courts, namely, to consider and evaluate the evidence at hand. Suffice it to say, the Missouri Supreme Court made utterly no attempt to address its own arbitrary violation of Constitutional Due Process in response to Doe Run's motion for rehearing. This Court should grant certiorari to resolve the conflict between the Missouri Supreme Court's decision and Supreme Court precedent and fundamental fairness principles embodied in the Due Process Clause.

II. This Case Involves a Question of Exceptional Importance, in that the Result, if Undisturbed, Will Lead to Civil Defendants Being Wrongfully Denied Any Substantive Opportunity to Challenge False Venue Pleadings.

This Court has long recognized the importance of the Due Process Clause of the Fourteenth Amendment in protecting individuals against the arbitrary and summary deprivations of "life, liberty, or property" by the government. U.S. CONST., amend. XIV, Due Process Clause; *Mathews v. Eldridge*, *supra*, 424 U.S. at 333-334; *Wolff v. McDonnell*, *supra*, 418 U.S. at 558; *Meachum v. Fano*, *supra*, 427 U.S. at 226; *Dent v. West Virginia*, *supra*, 129 U.S. at 123. This Court has further acknowledged the importance of such due process considerations in the context of state venue restrictions. *See Groppi v. Wisconsin*, 400 U.S. 505, 508, 511 (1971) (invalidating state venue statute that did not permit change of venue in misdemeanor cases and noting that "[u]nder the Constitution a defendant must be given an opportunity to show that a change of venue *is* required in *his* case") (emphasis in original); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (holding that denial of request for change of venue was denial of due process where heavy pretrial publicity made it impossible for defendant to have fair trial). The instant case demands reaffirmation of these basic Constitutional principles.

The rulings of the Missouri Supreme Court in the instant case deprive civil defendants of the opportunity to adduce the only competent evidence that could be advanced in support of their right not to be sued in a court where venue can be established only by false pleading. In other words, the Missouri Supreme Court denies defendants the right to be heard on the venue question by

summarily excluding the affidavits necessary to sustain the merit of defendants' position. Clearly, if the Missouri Supreme Court's opinion is permitted to stand, civil defendants in Missouri will be effectively precluded from challenging false venue allegations. Moreover, multiple other States have statutes and case law which facially permit the submission of post-petition affidavits. *See, e.g.*, *Ex parte Pike Fabrication, Inc.*, 859 So.2d 1089, 1091-1092 (Ala. 2002) (noting that party may submit evidentiary materials, including affidavits, in support of motion to dismiss based on improper venue); *Gila Irrigation Valley Dist. v. Super. Ct.*, 697 P.2d 681, 683 (Ari. 1985) (discussing how parties are permitted under ARIZ. REV. STAT. § 12-404 to file affidavits and controverting affidavits regarding the propriety of venue); *Berry v. State*, 290 Ark. 223, 234 (Ark. 1986) (addressing ARK. CODE ANN. § 43-1502 and venue removal of cases based on affidavit evidence); *Hall v. Super. Ct.*, 27 Cal. Rptr. 497, 499 (Cal. Ct. App. 1963) (finding defendant can file affidavits in support of motion for change of venue); *Plasil v. Tableman*, 612 A.2d 763, 765 (Conn. 1992) (stating that motion to dismiss for improper venue can be supported by affidavits regarding facts not on the record); *Tulli v. Tulli*, 780 So.2d 213, 214 (Fla. Ct. App. 2001) (noting that defendants can controvert plaintiffs' venue selection with affidavit evidence); *Peterson v. Monsanto Co.*, 157 Ill. App. 3d 508, 512 (Ill. Ct. App. 1987) (noting that 735 ILL. COMP. STAT. § 2-104(c) permits parties to submit affidavits relating to motions to transfer to proper venue); *Stovall v. Carimi*, 667 So.2d 1107, 1109, 1111 (La. Ct. App. 1995) (considering affidavits submitted by defendants in assessing whether venue was proper); *Sherman v. Curtis Indus., Inc.*, App. No. 85-133-II, 1985 Tenn. App. LEXIS 3192, *1-*3 (Tenn. Ct. App. 1985) (considering affidavits submitted in support of motion to dismiss for

improper venue); *Hanks v. Beckley Newspapers Corp.*, 142 S.E.2d 727, 728-729 (W. Va. 1965) (analyzing affidavits and counter-affidavits filed by parties in connection with motion to dismiss for improper venue). If courts from these States follow the Missouri example and ignore Due Process requirements, civil defendants from States across the nation may suffer substantial deprivations of their state-created venue rights.

Additionally, there has been scant jurisprudence from this Court addressing the minimum due process requirements relating to government deprivation of constitutionally protectible interests for defendants in the context of venue issues, as noted by Justice Marshall in his dissent from a denial of certiorari in *Brecheen v. Oklahoma*, 485 U.S. 909 (1988):

> We have had little occasion to apply these basic principles to determine whether particular state standards for change of venue comport with the requirements of due process. * * * Although we did strike down one state venue statute which categorically denied change of venue for misdemeanors, *see Groppi v. Wisconsin*, *supra*, we have not considered any other wholesale restrictions on venue change.
>
> In this vacuum of constitutional precedent, states have taken divergent paths. * * * We should grant certiorari to establish clearly the minimal requirements of the due process clause for state change of venue standards.

485 U.S. at 910-911. Petitioner Doe Run has found no case from this Court specifically addressing the Due Process issue for defendants in the context of *civil* venue matters. By granting certiorari here, this Court could provide

invaluable instruction and guidance to lower courts and executive authorities regarding the limits on deprivation of civil defendants' rights imposed by the Due Process Clause of the Fourteenth Amendment, in addition to remedying the wrongful deprivations that occurred below.

CONCLUSION

For the foregoing reasons, Petitioners The Doe Run Resources Corporation, DR Acquisition Corporation, and Marvin K. Kaiser, respectfully request the Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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JUNE 25, 2004

State ex rel. The Doe Run Resources Corporation, et al., Relators, vs. Honorable Margaret M. Neill, Presiding Judge, Twenty-Second Judicial Circuit, City of St. Louis, Respondent.

No. SC85451

SUPREME COURT OF MISSOURI

128 S.W.3d 502; 2004 Mo. LEXIS 22

February 10, 2004, Filed

COUNSEL: FOR RELATORS: Mr. Andrew Rothschild, Mr. Richard A. Ahrens, St. Louis, Missouri. Mr. John H. Quinn, III, St. Louis, Missouri, Mr. Jeffrey L. Cramer, Mr. T. Michael Ward, St. Louis, Missouri. Mr. James M. Cox, Mr. John R. Musgrave, St. Louis, Missouri.

FOR RESPONDENT: Mr. Edward D. Robertson, Jr., Mr. Anthony L. DeWitt, Jefferson City, Missouri. Mr. Robert F. Ritter, Mr. Maurice B. Graham, Mr. Patrick J. Hagerty, St. Louis, Missouri. Mr. Kevin S. Hannon, Denver, Colorado. Mr. Jeffrey J. Lowe, Mr. Francis Casey Flynn, St. Louis, Missouri. Mr. William M. Wunderlich, High Ridge, Missouri.

FOR AMICUS CURIAE: Mr. James W. Gallaher, Jefferson City, Missouri. Mr. Marc H. Ellinger, Jefferson City, Missouri.

JUDGES: RICHARD B. TEITELMAN, Judge. White, C.J., Wolff and Stith, JJ., concur; Benton, J., dissents in separate opinion filed; Price and Limbaugh, JJ., concur in opinion of Benton, J.

OPINION BY: RICHARD B. TEITELMAN

OPINION:

Original Proceeding in Prohibition

Relators Doe Run Resources Corporation, *et al.*, seek a writ of prohibition barring Respondent from taking any further action other than transferring the underlying case to a proper venue. Relators argue that defendant Marvin Kaiser, the chief financial officer (CFO) of Doe Run and a resident of the City of St. Louis at the time the petition was filed, was joined pretensively so that the plaintiffs could obtain venue in the Circuit Court of the City of St. Louis. The preliminary writ previously issued is quashed.

BACKGROUND

Doe Run operates a lead smelter in Herculaneum, Missouri. The smelter emits particulate lead and other contaminants. As a result of these emissions, eight individuals filed a class action suit in the Circuit Court of the City of St. Louis. The plaintiffs allege that emissions from the smelter have damaged property in a defined area within the City of Herculaneum. They pled causes of action for negligence and negligence per se, strict liability, private nuisance, and trespass. The plaintiffs sued both resident and nonresident corporations and individuals, including Doe Run and Mr. Kaiser.

Plaintiffs contend that city venue is appropriate under section 508.010.3, which provides that "[w]hen there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county of this state in which any defendant resides. . . . " Section 508.010(3). The only alleged nexus with the City of St. Louis is that Mr. Kaiser resided in the City at the time the petition was filed.

Conversely, Relators argue that Mr. Kaiser was joined pretensively solely to obtain city venue. Relators contend that the petition fails to state a claim against Mr. Kaiser in his individual capacity because all of the alleged acts and omissions occurred within the course and scope of his employment. Alternatively, Relators argue that even if the plaintiffs state a claim against Mr. Kaiser individually, the facts pled are demonstrably false and no cause of action lies.

ANALYSIS

Prohibition

Prohibition is a discretionary writ that may be issued to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power. *State ex rel. York v. Daugherty,* 969 S.W.2d 223, 224 (Mo. banc 1998). Prohibition is appropriate if venue is improper. *State ex rel. SSM Health Care St. Louis v. Neill,* 78 S.W.3d 140, 142 (Mo. banc 2002). However, prohibition is an extraordinary writ and is issued sparingly. Prohibition lies only if the facts and circumstances of a particular case demonstrate unequivocally that there exists an extreme necessity for preventative action. *Derfelt v. Yocom,* 692 S.W.2d 300, 301 (Mo. banc 1985).

Pretensive Joinder

Although plaintiffs may file suit in any statutorily permissible venue, courts will not permit plaintiffs to engage in the pretense of joining defendants for the sole purpose of obtaining venue. *State ex rel. Malone v. Mummert,* 889 S.W.2d 822, 824 (Mo.banc 1994). The party

claiming pretensive joinder bears the burdens of persuasion and proof. *Id.*

There are two tests for pretensive joinder. *Id.* Under the first test, joinder is pretensive if the petition on its face fails to state a claim against the joined defendant. *Id.* Under the second test, joinder is pretensive if there is in fact no cause of action against the joined defendant, even though the petition on its face states a cause of action. *Id.* at 825. Both tests are objective, requiring that the plaintiff have a realistic belief under the law and evidence that a valid claim exists. *Id.* Joinder is pretensive if either test is satisfied. *Hefner v. Dausmann,* 996 S.W.2d 660, 663 (Mo.App. S.D. 1999). Relators argue that the plaintiffs' joinder of Mr. Kaiser is pretensive under both tests.

I. The first *Malone* test

Relators argue that the petition fails to state a claim against Mr. Kaiser individually because the alleged acts and omissions were carried out in his capacity as a corporate officer, not as an individual. As noted in *Malone,* whether a petition states a claim against a defendant for venue purposes is a difficult issue. *Id.* at 825. The standard for determining if a petition states a claim against a defendant for venue purposes is whether, after reasonable legal inquiry under the circumstances, the plaintiffs state a claim under existing law or under a non-frivolous argument for the extension, modification or reversal of existing law, or under a non-frivolous argument for the establishment of new law. *Id.* at 825. Although this standard is less stringent than for granting a motion for summary judgment or sustaining a motion to dismiss on the merits, the

petition still must be "liberally construed" in favor of the plaintiff. *Id.*

While simply holding a corporate office does not expose an officer to individual liability for corporate misdeeds, it also does not necessarily shield the officer from individual liability. An individual is not protected from liability simply because the acts constituting the tort "were done in the scope and course, and pertained to, the duties of his employment." *Curlee v. Donaldson,* 233 S.W.2d 746, 754 (Mo.App. 1950). If the rule were otherwise, "the agent of a corporation could shield himself from liability for almost every kind of wrong, provided he was acting in the capacity of agent. . . ." *Boyd v. Wimes,* 664 S.W.2d 596, 598 (Mo. App. 1984), quoting, *Rauch v. Brunswig,* 155 Mo. App. 367, 137 S.W. 67, 68 (Mo. App. 1911). Thus, a corporate officer may be held individually liable for tortious corporate conduct if he or she had "actual or constructive knowledge of, and participated in, an actionable wrong." *Lynch v. Blanke Baer & Bowey Krimko, Inc.,* 901 S.W.2d 147, 153 (Mo. App. 1995); *Grothe v. Helterbrand,* 946 S.W.2d 301, 304 (Mo. App. 1997).

When liberally construed, the plaintiffs' petition states a cause of action against Mr. Kaiser in his individual capacity that is sufficient to withstand a motion to dismiss based upon alleged pretensive joinder. The plaintiffs allege that Doe Run had a duty under state and federal environmental laws to control its emissions and that Doe Run was in violation of those laws, leading directly to the property damage within the defined area. The plaintiffs further allege that Kaiser, as the CFO, knew of and participated in Doe Run's tortious conduct by helping to set and then approve budgets that delayed or rejected the implementation of adequate measures for pollution control as well as

remediation of properties within the defined area. Because of his actions, plaintiffs allege that Mr. Kaiser had "actual or constructive knowledge of Doe Run's wrongful conduct and participated in it" and, thus, is liable in his individual capacity. These allegations state a cause of action against Mr. Kaiser in his individual capacity under the standards announced in *Lynch* and *Grothe*. Relators have failed to carry their burden of showing that the plaintiffs failed to state a cause of action against Mr. Kaiser.

II. The second *Malone* test

Relators also argue that even if plaintiffs' petition states a cause of action, the facts pleaded are not true and demonstrate that Mr. Kaiser was joined pretensively. To prevail on this argument, Relators must show that the "record, pleadings, and facts presented in support of [their] motion asserting pretensive joinder establish that there is, in fact, no cause of action against the [joined] defendant and that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against the [joined] defendant." *Malone,* at 825. Even if the plaintiffs' reasonable belief subsequently proves false, it is "irrelevant" to the pretensive joinder determination. *Bottger v. Cheek,* 815 S.W.2d 76, 79 (Mo. App. 1991).

To refute the plaintiffs' allegations, Relators included the affidavits of Mr. Kaiser and another corporate officer. Both affidavits challenge the plaintiffs' allegations that Mr. Kaiser approved budgets that rejected or delayed the implementation of pollution controls. However, these affidavits were not made until after the plaintiffs filed

their petition, and, as such, were not among the "information available at the time the petition was filed." *See Malone* at 825. Furthermore, where the plaintiffs can point to specific facts that support their belief that a cause of action existed against Mr. Kaiser at the time the petition was filed, joinder is not pretensive. *See State ex rel. Hoeft v. Koehr,* 825 S.W.2d 65, 67 (Mo. App. 1992). The plaintiffs contested the affidavits by filing numerous exhibits containing the facts and data relied upon to plead their claim against Mr. Kaiser. These exhibits included information on general environmental conditions around the smelter as well as specific budget decisions regarding environmental matters. As the CFO, Mr. Kaiser was or likely was involved in these decisions. After briefing, argument, and reviewing the evidence, Respondent found that the information available to the plaintiffs at the time the petition was filed supported a realistic belief that a valid claim against Mr. Kaiser exists under Missouri law. This Court agrees. While it is possible that Mr. Kaiser may eventually succeed on a motion for summary judgment or at trial, the ultimate substantive merits of plaintiffs' allegations as determined later in the judicial process are not relevant at this stage. The only relevant inquiry is whether the records and pleadings support a realistic belief that there is a claim against Mr. Kaiser. Relators have not carried their burden of showing that the facts pled are in fact false.

The preliminary writ previously issued is quashed.

RICHARD B. TEITELMAN, Judge

White, C.J., Wolff and Stith, JJ., concur; Benton, J., dissents in separate opinion filed; Price and Limbaugh, JJ., concur in opinion of Benton, J.

DISSENT BY: Duane Benton

DISSENT:

DISSENTING OPINION

I dissent. This case exemplifies the general rule:

> Merely holding a corporate office will not subject one to personal liability for the misdeeds of the corporation.

Boyd v. Wimes, 664 S.W.2d 596, 598 (Mo. App. 1984). This is common sense because corporations must act through individuals, who are not personally liable for doing their jobs. Someone must hire and fire employees, without incurring personal liability. ***Lynch v. Blanke Baer & Bowey Krimko, Inc.***, 901 S.W.2d 147, 154 (Mo. App. 1995). Someone must carry out contracts, without incurring personal liability. ***Zipper v. Health Midwest***, 978 S.W.2d 398, 414 (Mo. App. 1998).

There is an exception:

> [N]othing short of active participancy in a positively wrongful act intendedly and directly operating injuriously to the prejudice of the party complaining will give origin to individual liability.

Fusz v. Spaunhorst, 67 Mo. 256, 264 (1878); ***Wolfersberger v. Miller***, 327 Mo. 1150, 39 S.W.2d 758, 764 (Mo. 1931). A corporate president that defrauds or steals is personally liable, although acting in the corporation's name. *See* ***Boyd***, 664 S.W.2d at 598; ***Grothe v. Helterbrand***, 946 S.W.2d 301, 304 (Mo. App. 1997); ***Rauch v.***

Brunswig, 155 Mo. App. 367, 137 S.W. 67, 67-68 (Mo. App. 1911); ***Osterberger v. Hites Constr. Co.***, 599 S.W.2d 221, 229 (Mo. App. 1980); ***Constance v. B.B.C. Dev't Co.***, 25 S.W.3d 571, 589-90 (Mo. App. 2002). A manager who controls the operations of the corporation, and directs the wrong, is individually liable. ***Robinson v. Moark-Nemo Consol. Mining Co.***, 178 Mo. App. 531, 163 S.W. 885, 887-88 (Mo. App. 1914); ***Curlee v. Donaldson***, 233 S.W.2d 746, 754 (Mo. App. 1950). Usually, an officer held personally liable is an owner of the corporation. *See, e.g.*, ***Grothe***, 946 S.W.2d at 304; ***Constance***, 25 S.W.3d at 589; ***Curlee***, 233 S.W.2d at 754.

In this case, the officer is not the president, not a manager of operations, and not an owner. He is a staff officer, the chief financial officer. Before a corporate staff officer may be sued individually, active participancy requires more than the performance of normal job duties. Suit should not be allowed for "rubber stamp" financial approval or authorization. To constitute active participancy, a chief financial officer must have the freedom to disburse funds in a discretionary manner, and actively do so with the intent to accomplish a positively wrongful act.

Plaintiffs do not allege that Marvin K. Kaiser, the chief financial officer, had any discretion over environmental funding. The petition does not state a cause of action against Kaiser. *See* ***State ex rel. Malone v. Mummert***, 889 S.W.2d 822, 825 (Mo. banc 1994). Most allegations against him repeatedly re-state the precise words of the exception. "Mere conclusions of the pleader not supported by factual allegations are disregarded in determining whether a petition states a claim on which relief can be granted." ***Commercial Bank of St. Louis County v. James***, 658 S.W.2d 17, 22 (Mo. banc 1983). The more

specific allegations in the petition reference Kaiser's "involvement" in budgeting, such as helping to set budgets, approving expenditures, and signing financial assurances to the State of Missouri. *See* **Section 444.368 RSMo 2000**. Plaintiffs never allege that he had any discretionary authority, the minimum for active participation.

More importantly, joinder is pretensive if there is in fact no cause of action against the joined defendant, even if the petition on its face states a cause of action. *See* ***Mummert***, 889 S.W.2d at 825. Here, joinder is pretensive because Kaiser did not actively participate in making environmental decisions. Kaiser never refused to authorize a funding request. He supplied one of six required signatures for financial disbursements, in order to ensure that spending was properly authorized, funded, and accounted for. He never had authority over any environmental employees or programs. He did not propose or reject specific environmental expenditures.

Venue is not proper in the Circuit Court for the City of St. Louis. Fortunately, the General Assembly can correct the state of the law. Venue is determined solely by statute. ***State ex rel. BJC Health System v. Neill***, 121 S.W.3d 528, 529 (Mo. banc 2003). The legislature can prescribe that, when the corporation is also a defendant, venue is not determined by the personal residence of a (non-owner) corporate officer.

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Duane Benton, Judge

In the Missouri Court of Appeals
Eastern District

STATE OF MISSOURI, ex rel. THE DOE RUN RESOURCES CORP., et al., Relators, v. MARGARET M. NEILL, Circuit Court Judge Twenty-Second Judicial Circuit, Missouri. Respondent.	No. ED81573 Writ of Prohibition or, in the Alternative, Petition for Writ of Mandamus and Suggestions in Support Circuit Court No. 012-08641

PRELIMINARY ORDER IN PROHIBITION

The State of Missouri to Respondent, Honorable Margaret M. Neill, Judge of the Circuit Court for the 22nd Judicial Circuit, City of St. Louis:

You are hereby directed to file your answer on or before August 23, 2002, and to serve a copy of your answer on Relators' attorneys Andrew Rothchild [sic] and Richard A. Ahrens whose address is 500 North Broadway, Suite 2000, St. Louis, Missouri 63102, John H. Quinn, III and Russell C. Riggan whose address is One Metropolitan Square, Suite 2600, St. Louis, Missouri 63102-2740, Jeffrey L. Cramer and Stephen P. Krchma, 1010 Market, 20th Floor, St. Louis, Missouri 63101, John R. Musgrave and James M. Cox, One Firstar Plaza, St. Louis, Missouri 63101, Ruth A. Przybeck, 727 Craig Road, Suite 110, St. Louis, Missouri 63141. If you fail to do so, judgment by default will be taken against you for the relief demanded in the petition.

Relator's brief is due September 16, 2002.
Respondent's brief is due October 7, 2002.
Reply brief if any is due October 17, 2002.
Oral Argument will be scheduled at a later date.

You are ordered to refrain from all action in the premises until further order.

SO ORDERED:

DATE: AUGUST 16, 2002 /s/ Lawrence G. Crahan
Lawrence G. Crahan
Presiding Judge,
Writ Division II
Missouri Court of Appeals
Eastern District

cc: Judge Margaret M. Neill
Andrew Rothchild [sic]
Richard A. Ahrens
John H. Quinn, III
Russell C. Riggan
Jeffrey L. Cramer
Stephen P. Krchma
John R. Musgrave
James M. Cox
Ruth A. Przybeck
Robert Ritter
Maurice B. Graham
Morry S. Cole
Jeffrey J. Lowe
Kevin S. Hannon
Robert B. Reeser, Jr.

STATE OF MISSOURI, ex rel., THE DOE RUN RESOURCES CORPORATION, et al., Relators, v. HONORABLE MARGARET M. NEILL, Presiding Judge, Twenty-Second Judicial Circuit, City of St. Louis, Respondent.

No. ED 81573

COURT OF APPEALS OF MISSOURI, EASTERN DISTRICT, WRIT DIVISION TWO

2003 Mo. App. LEXIS 745

May 20, 2003, Filed

COUNSEL: For Relator Marvin K. Kaiser: Brown & James, P.C., Jeffrey L. Cramer, T. Michael Ward, St. Louis, Missouri.

For Relators The Doe Run Resources Corporation, The Renco Group, Inc., Ira Rennert, Bruce C. Clark, and DR Acquisition Corporation; Lewis, Rice & Fingersh, L.C., Andrew Rothchild [sic], Richard A. Ahrens, St. Louis, Missouri.

For Relators Fluor Corporation Leslie G. McGraw, A.T. Massey Coal Co., and Doe Run Investment Holding Co.: Armstrong Teasdale, LLP, John H. Quinn, III, St. Louis, Missouri.

For Relator Homestake Lead Company of Missouri: Thompson Coburn, LLP, John R. Musgrave, James M. Cox, St. Louis, Missouri.

FOR RESPONDENT: Jeffrey L. Lowe, Simon, Lowe, & Passanante, LLC, St. Louis Missouri.

Kevin S. Hannon, The Hannon Law Firm, LLC, Denver, Colorado.

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Robert F. Ritter, Morry S. Cole, Gray, Ritter & Graham, P.C., St. Louis, Missouri.

JUDGES: Lawrence G. Crahan, *Presiding Judge*, Robert G. Dowd, Jr., J., Concurs, Mary K. Hoff, J., Concurs.

OPINION BY: Lawrence G. Crahan

OPINION:

Writ of Mandamus

The Doe Run Resources Corporation ("Doe Run"), Acquisition Corporation, Bruce C. Clark, Ira L. Rennert, The Renco Group, Inc. and Homestake Lead Company of Missouri (collectively "Relators") seek a writ of prohibition barring Respondent from taking any further action in the underlying cause, No. 012-08641, other than transfer to a proper venue. After briefing and argument, we order that our previously issued preliminary writ of prohibition now be made permanent.

The underlying action was filed by eight named plaintiffs individually and as putative class representatives of all persons or legal entities owning property in a defined area within the City of Herculaneum, Missouri ("Plaintiffs"). Plaintiffs are seeking to recover damages from Relators and other defendants for property damage allegedly resulting from the release of metals and other substances from Doe Run's lead smelter located in Herculaneum based on the theories of negligence and negligence per se, strict liability, private nuisance and trespass.

Three of the named Plaintiffs in the underlying case were also named plaintiffs in a prior putative class action filed in 1995 in the Circuit Court of Jefferson County which likewise sought to recover for damage to real

property in the City of Herculaneum allegedly caused by emissions from the smelter.[1] After extensive discovery and a hearing, the judge in the Jefferson County case denied the plaintiff's motion for class certification. Those plaintiffs then dismissed the Jefferson County case without prejudice.

The same day, the underlying case was filed in the Circuit Court of the City of St. Louis. The original petition named only three defendants, two individuals and one corporation, all non-residents of Missouri. Plaintiffs pleaded that venue was proper pursuant to section 508.010(4) RSMo 2000,[2] which allows a plaintiff to bring suit in any Missouri county when none of the defendants is a Missouri resident.

The following day, Plaintiffs filed a First Amended Petition asserting the same claims but adding five additional corporate defendants. Some of the corporate defendants were Missouri residents for venue purposes, but none have either a registered agent in the City of St. Louis or an office for the conduct of their usual and customary business in the City of St. Louis. Plaintiffs again pleaded that venue was proper pursuant to section 508.010(4), which applies when none of the defendants are Missouri residents. The defendants moved to dismiss or transfer for improper venue arguing, inter alia, that venue should be determined on the basis of the First Amended Petition,

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[1] The Jefferson County case also included a medical monitoring claim which is not asserted in the instant case.

[2] All statutory references are to RSMo 2000 unless otherwise indicated.

which included Missouri residents as defendants, rather than the original petition, which did not.

While this motion was pending, the Missouri Supreme Court handed down its decision in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001), holding that venue must be examined each time a plaintiff brings a new defendant into a lawsuit.

Because the First Amended Petition included corporate defendants that were Missouri residents for venue purposes, this meant that venue would no longer be proper in the City of St. Louis and Plaintiffs could no longer rely on section 508.010(4).

Over the defendants' objection, Plaintiffs obtained leave to file a Second and a Third Amended Petition, which named three additional defendants, one of whom, Marvin Kaiser, is a resident of the City of St. Louis.[3] It is undisputed that venue is now predicated solely on the fact that Mr. Kaiser resides in the City of St. Louis.

In response to the Third Amended Petition, Relators again moved to dismiss or transfer, urging that Mr. Kaiser was pretensively joined for the purpose of creating venue. Mr. Kaiser also moved to dismiss himself from the lawsuit on the ground that the Third Amended Petition failed to state any claims against him upon which relief can be granted. Respondent denied the motions and Relators filed their petition in this court seeking a writ of prohibition. As

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[3] According to an affidavit filed by Doe Run's Vice President-Human Resources, Mr. Kaiser was the only one of Doe Run's 1,419 Missouri employees who resided in the City of St. Louis when he was named as a defendant.

they did in the trial court, Relators claim that Mr. Kaiser was pretensively joined for the purpose of obtaining venue in the City of St. Louis and that, absent the claims against Mr. Kaiser, there is no basis for venue in the City of St. Louis. Respondent does not dispute that the claims against Mr. Kaiser are the sole basis for venue in the City of St. Louis.

Because improper venue is a fundamental defect, a court that acts when venue is improper acts in excess of its jurisdiction. *State ex rel. SSM Health Care St. Louis v. Neill,* 78 S.W.3d 140, 142 (Mo. banc 2002). Accordingly, prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue. *Id.*

Courts will not permit plaintiffs to engage in the pretense of joining defendants for the sole purpose of obtaining venue. *State ex rel. Malone v. Mummert,* 889 S.W.2d 822, 824 (Mo. banc 1994). Courts recognize pretensive joinder (1) where the pretensive nature of the joinder appears on the face of the pleadings, and (2) where there is in fact no cause of action against the resident defendant. *State ex rel. Coca Cola Bottling Co. of Mid-America v. Gaertner,* 681 S.W.2d 445, 447 (Mo. banc 1984). "[T]here are two possible avenues open for attacking joinder on the ground that it is pretensive: First, the party can assert that the facts pleaded in the petition are not true; and, second, the party can claim that the facts, even if true, do not support a valid claim based on substantive law." *Mummert,* 889 S.W.2d at 825. Joinder is pretensive if either prong is satisfied. *Hefner v. Dausmann,* 996 S.W.2d 660, 663 (Mo. App. 1999).

Although Relators assert that both tests of pretensive joinder are satisfied in this case, we find that joinder is pretensive because the facts pleaded in the Third Amended Petition do not support a valid claim against Mr. Kaiser based on substantive law.

The petition alleges that at all relevant times, Mr. Kaiser was and is the Vice President and Chief Financial Officer of Doe Run. All of the acts and omissions Mr. Kaiser allegedly committed were performed within the course and scope of his employment. The petition alleges that Mr. Kaiser is liable to Plaintiffs because, as an officer of Doe Run, he had actual or constructive knowledge of Doe Run's wrongful conduct and participated in it. Specifically, Plaintiffs allege that Mr. Kaiser approved expenditures for pollution control equipment and measures, expenditures for the remediation of properties and expenditures for the purchase of contaminated properties around the smelter as a pollution buffer. Mr. Kaiser made representations of financial assurance to the State of Missouri for the purpose of complying with state environmental laws. As Chief Financial Officer, Mr. Kaiser had involvement in Doe Run's budgeting process including setting environmental goals for the smelter and the pollution control budget that included the purchase of contaminated properties. Mr. Kaiser allegedly participated in and approved budgets which delayed or rejected implementation of proper pollution control measures and remediation of properties in the area defined in the petition. Plaintiffs further allege that Mr. Kaiser had knowledge of technologies available to remediate contaminated soils that were not used, and failed to take action to eliminate or reduce the emission of toxic substances from the smelter.

Finally, Plaintiffs allege that Mr. Kaiser, as an officer of Doe Run, engaged in a conspiracy to fail to adequately control emissions from Doe Run's smelter and/or to not implement adequate pollution controls at the smelter and/or to violate the Ambient Air Quality Standard for lead because of the cost and reduction of profits, bonuses and the value of the wages, stock and/or stock options of Doe Run and other corporate defendants. Thus, Plaintiffs allege that Mr. Kaiser had an economic motive and personally benefited from the alleged conspiracy.

Relators urge that these allegations are plainly insufficient to state a claim against Mr. Kaiser in his individual capacity because the petition specifically alleges that Mr. Kaiser's alleged actions and omissions occurred within the course and scope of his employment. Indeed, the very nature of the actions Mr. Kaiser is alleged to have taken is such that that they could only be undertaken in Mr. Kaiser's official capacity as the Chief Financial Officer of Doe Run and not in an individual capacity. Relators rely on *Lynch v. Blanke Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147, 153-54 (Mo. App. 1995) for the proposition that such allegations are fatal to any claim of individual liability on the part of Mr. Kaiser.

In *Lynch,* a former employee of a corporation sued for wrongful discharge in the City of St. Louis. The plaintiff named as defendants both the corporation, a resident of St. Louis County for venue purposes, and its president who was a resident of the City of St. Louis. 901 S.W.2d at 150. The president personally terminated the plaintiff's employment. *Id.* at 154. On the defendants' motion, the trial judge found that the president had been pretensively joined, dismissed the case against him, and transferred the action against the corporation to St. Louis County. *Id.*

at 152-53. On appeal, this court affirmed, noting that the plaintiff had specifically pled that in terminating his employment, the president was "acting for" the corporation. *Id.* at 153. Because there was no allegation that the president had acted in an individual capacity the petition did not state a cause of action against the president as an individual. *Id.* at 154.

In this case, as in *Lynch,* Plaintiffs specifically alleged that all of Mr. Kaiser's actions were undertaken within the course and scope of his employment and agency. This is fatal to any claim that Mr. Kaiser is liable in his individual capacity.

In the trial court and in this court, however, Plaintiffs urged that Mr. Kaiser may be liable in his capacity as an officer of Doe Run. Under Missouri law, "merely holding a corporate office will not subject one to personal liability for the misdeeds of the corporation." *Id.* at 153. "In order to make an officer or agent of a corporation liable to a third person, something more must be shown than a mere act of nonfeasance on the part of the agent." *Premier Bank v. Tierney,* 114 F. Supp. 2d 877, 886 (W.D. Mo. 2000) (citing *Darling & Co. v. Fry,* 24 S.W.2d 722, 723 (Mo. App. 1930)). "Nothing short of active participancy in a positively wrongful act intendedly and directly operating injuriously to the prejudice of the party complaining will give origin to individual liability." *Darling,* 24 S.W.2d at 723 (quoting *Fusz v. Spaunhorst,* 67 Mo. 256, 264 (Mo. banc 1978)). As the court explained in *Darling:*

> [I]t seems that the true basis of liability should be the violation by the officer or servant of some duty owed to the third person by reason whereof injury results to such third person. Certainly the managing officer of a corporation

> would not be liable to a third person for any injury resulting from a neglect of duty unless that duty was one he owed to such third person.

24 S.W.2d at 724.

The cases Plaintiffs cite as authority are consistent with these principles but readily distinguishable from the case at bar. In *Curlee v. Donaldson,* 233 S.W.2d 746 (Mo. App. 1950), a landowner had authorized a corporation to cut timber on his land. *Id.* at 749. At some point during the project it became apparent that timber had been cut from the plaintiff's adjacent land. Plaintiff sued for trespass and named both the corporation and its president as defendants. *Id.* at 748. The plaintiff obtained judgment against both defendants. On appeal, the court upheld the judgment against both the corporation and the president. *Id.* at 754. By ordering and directing the woodcutters to the tract where they were authorized to cut and failing to provide supervision, the president became liable for the trespass. *Id.* The court emphasized the complete control the president had over the woodcutting operation. In addition to being the president, he was the treasurer and general manager and one of only three directors and stockholders. *Id.* at 749. The court found that the president had complete control over the cutters. Moreover, when the foreman who had been in direct charge of woodcutting resigned, the president failed to replace him.

In contrast, Plaintiffs in this case have not alleged that Mr. Kaiser has any kind of management or supervisory authority over the day-to-day operation of the lead smelter or in the area of environmental compliance. His role at Doe Run appears to be completely restricted to managing the company's finances. In performing his

obligations, his duty runs to the corporation and its shareowners, not to Plaintiffs.

In *Constance v. B.B.C. Dev. Co.*, 25 S.W.3d 571 (Mo. App. 2000), the court held that a corporation's president who had guaranteed the corporation's construction loans could be found liable for fraud. *Id.* at 589-90. The president had been present and remained silent when the construction supervisor told the prospective buyer that the lots at issue were "buildable," without disclosing prior landslides and street failures that had occurred on the property. *Id.* at 579. Because he remained silent despite his personal knowledge of the prior problems with the property, the court found that he was a direct participant in the actionable fraud and thus could be held liable along with the corporation. *Id.* at 590.

Making fraudulent misrepresentations to a third party is a breach of a personal duty in and of itself, regardless of whether it is done within the course and scope of employment. In contrast, the only representations Plaintiffs allege Mr. Kaiser made in this case is a representation of financial assurance made to the State of Missouri. Such representations are required by law. 10 C.S.R. 45-6.030(2)(C). There is no allegation that any financial assurance document signed by Mr. Kaiser was false or caused anyone any injury. As for his approval of corporate budgets, nothing in the petition suggests that Mr. Kaiser's involvement was any more active or direct than it would be for any substantial expenditure made by Doe Run for any purpose.

Likewise, in *Osterberger v. Hites Const. Co.*, 599 S.W.2d 221 (Mo. App. 1980), the corporation's president, who personally signed warranty deeds to home purchasers

without disclosing outstanding deeds of trust, was held liable for fraud based on evidence that he had knowledge of and personally participated in the fraudulent concealment of the encumbrance. No such wrongful conduct is alleged on the part of Mr. Kaiser.

In *McKeehan v. Wittels,* 508 S.W.2d 277, 283 (Mo. App. 1974), two officers of an investment company were held liable for breach of fiduciary duty for failing to follow their client's instructions and failure to disclose their own interest in the investments. *Id.* at 280-83. The two officers as well as the corporation were found to have a fiduciary relationship to the plaintiff and therefore could properly be held liable for breach of that duty. *Id.* Plaintiffs in this case do not allege Mr. Kaiser had a fiduciary relationship or owed them any other form of personal duty.

In *Honigmann v. Hunter Group, Inc.,* 733 S.W.2d 799, 802 (Mo. App. 1987), the franchisee of a brokerage business franchise sued the franchisor and two of its officers for tortious interference with his contract with the franchisor and interference with business expectancy. *Id.* The dispute centered around an interpretation of the agreement and whether the franchisor breached its agreement by competing in franchisee's territory. The jury returned a verdict against all three defendants. *Id.* at 802. On appeal, the court noted that there was evidence that there was a confidential or fiduciary relationship between the plaintiff and the defendants. *Id.* at 807. The two individual defendants personally participated in the tortious interference. *Id.* In addition, there was evidence that the defendants used improper means in interfering with the franchisee's contract and that they had acted in their own personal interest. *Id.* at 808. Given those circumstances, the judgments against the corporate officers were affirmed. *Id.* at

810. We find no comparable allegations in the Third Amendment Petition.

Grothe v. Helterbrand, 946 S.W.2d 301 (Mo. App. 1997) is another case, like *Curlee,* in which the individual defendant was president and general manager of a closely held corporation. *Id.* at 303-04. The defendant in *Grothe* personally made representations to the plaintiff which induced him to leave silver recovered from processed film with the corporation on consignment. *Id.* The defendant personally represented to the plaintiff that the silver would be physically stored at the corporation's facility and would be surrendered to him at his request. *Id.* Contrary to these representations, at the defendant's direction, the silver was periodically sold and the funds were absorbed in the corporation's accounts. *Id.* The corporation was later administratively dissolved. *Id.* On appeal, a directed verdict for the defendant was reversed based on the defendant's personal participation in the conversion of the plaintiff's silver. *Id.* This was sufficient to constitute a personal act of misfeasance and a positive wrong. *Id.* In this case, there is no allegation that Mr. Kaiser personally participated in the discharge of metals or other substances onto the Plaintiffs' property or that he had any responsibility or authority to control such emissions. *Grothe* does not support Plaintiffs' position.

Likewise *Boyd v. Wimes,* 664 S.W.2d 596, 598 (Mo. App. 1984), involved a closely held corporation and an individual owner who held many corporate offices. In *Boyd,* the owner allegedly personally participated in the conversion of the plaintiff's escrow funds. *Id.* Such personal participation in the conversion was held sufficient to support personal liability on the part of the owner. *Boyd* is

thus plainly distinguishable from the allegations at issue in this case.

Finally, Relators urge that Plaintiffs' allegations that Mr. Kaiser engaged in a conspiracy with other unnamed and unspecified conspirators to violate the environmental laws are conclusory and do not allege sufficient facts to support a cause of action for conspiracy. Moreover, as a matter of law, a corporation cannot conspire with its agents. *Creative Walking, Inc. v. American States Ins. Co.,* 25 S.W.3d 682, 688 (Mo. App. 2000). We agree. To state a claim for civil conspiracy, a plaintiff must allege, "(1) two or more persons; (2) with an unlawful objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and (5) the plaintiff was thereby damaged." *Rice v. Hodapp,* 919 S.W.2d 240, 245 (Mo. banc 1996). The grounds of a civil conspiracy must be set out with the same certainty and particularity as an ordinary civil action against a single defendant. *See Royster v. Baker,* 365 S.W.2d 496, 500 (Mo. 1963). In her order, Respondent found that Plaintiffs' allegations are conclusory. We agree. There is no allegation of any specific "meeting of the minds" as to any specific objective with any specific individual. Plaintiffs have not stated a claim against Mr. Kaiser for civil conspiracy.

We hold that the Third Amended Petition does not state a claim for which relief can be granted against Mr. Kaiser and that he was pretensively joined for the purpose of obtaining venue in the City of St. Louis. Accordingly, we order that our preliminary writ of prohibition now be made permanent and direct Respondent to take no further action in the case other than to transfer the underlying cause to a county of proper venue.

Lawrence G. Crahan, Presiding Judge.

Robert G. Dowd, Jr., J., Concurs.

Mary K. Hoff, J., Concurs.

State of Missouri, ex. rel. The Doe Run Resources Corporation, et al., Relators, vs. Honorable Margaret M. Neill, Presiding Judge, Twenty-Second Judicial Circuit, City of St. Louis, Respondent.

SC85451

SUPREME COURT OF MISSOURI

128 S.W.3d 502; 2004 Mo. LEXIS 49

March 30, 2004, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: *State ex rel. Doe Run Res. Corp. v. Neill, 2004 Mo. LEXIS 22 (Mo., Feb. 10, 2004)*

OPINION:

Relators' motion for rehearing overruled.

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ex rel., THE DOE RUN RESOURCES CORPORATION, et al.,	)	
Relators,	)	
vs.	)	Cause No. SC85451
HON. MARGARET M. NEILL, Presiding Judge, Twenty-Second Judicial Circuit, City of St. Louis,	)	
Respondent.	)	

RELATORS' MOTION FOR REHEARING

COME NOW Relators, The Doe Run Resources Corporation, et al., and, pursuant to Missouri Supreme Court Rule 84.17, respectfully move the Court to vacate its opinion of February 10, 2004, and to grant a rehearing. In support of their Motion for Rehearing, Relators state as follows:

(1) On February 10, 2004, this Court denied Relators' petition for a writ of prohibition barring Respondent from taking any further action other than transferring the underlying case to a proper venue and quashed the preliminary writ previously issued. *See* Slip Opinion dated February 10, 2004 ("Slip Op.").

(2) In its Opinion, the Court held that Relators failed to prove that plaintiffs in the underlying case pretensively joined Marvin Kaiser, who is Chief Financial Officer for defendant The Doe Run Resources Corporation and the only alleged nexus with the City of St. Louis, wherein

Relators allegedly failed to carry their burden of showing that (a) plaintiffs did not state a cause of action against Kaiser on the face of the petition, or (b) the facts pled in the petition against Kaiser are in fact false and the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against Kaiser. *See* Slip Op. at 6-7.

(3) Missouri Supreme Court Rule 84.17 provides that a party may move for rehearing to "call attention to material matters of law or fact overlooked or misinterpreted by the court."

(4) Here the Court overlooked or misinterpreted material matters of law and fact in its analysis of the first prong of the pretensive joinder test, when the Court stated that a corporate officer may be held individually liable for knowledge of and mere "participat[ion]" in a corporate tort and that the plaintiffs' petition stated a cause of action against Kaiser by alleging that he had knowledge of tortious corporate conduct and "participated" in such tortious conduct "by helping to set and then approve budgets that delayed or rejected the implementation of adequate measures for pollution control as well as remediation of properties within the defined area." Slip Op. at 5.

(5) The Court's characterization of the corporate officer liability doctrine ignores Supreme Court precedent and governing Missouri law requiring "active participancy" in a corporate tort. *See, e.g.*, *Fusz v. Spaunhorst*, 67 Mo. 256, 264 (Mo. 1878); *Darling & Co. v. Fry*, 24 S.W.2d 722, 723 (Mo. App. 1930).

(6) Other than mere conclusions of the pleader, the plaintiffs' petition did not allege any facts that Kaiser

"actively participated" under Missouri law in any corporate tort. *See* Relators' Ex. 8, Third Amended Petition, ¶¶ 33-34; Substitute Brief of Relators at 31-44; Substitute Reply Brief of Relators at 4-17.

(7) Accordingly, rehearing is warranted with respect to the first prong of the pretensive joinder test because the Court overlooked and misinterpreted the material allegations of the plaintiffs' petition as well as the material law governing corporate officer liability for active participation in corporate torts.

(8) The Court also overlooked or misinterpreted material matters of law and fact in its analysis of the second prong of the pretensive joinder test, when the Court wholly disregarded the evidentiary affidavits of Kaiser and Jeffrey Zelms on the grounds that "these affidavits were not made until after the plaintiffs filed their petition, and, as such, were not among the information available at the time the petition was filed." Slip Op. at 6.

(9) The Kaiser and Zelms affidavits contained material facts regarding the duties, responsibilities, and actions of Kaiser, which facts were uncontroverted by any evidence offered by Plaintiffs. *See* Relators' Ex. 9, Tab J, Kaiser Affidavit; Relators' Ex. 12, Zelms Affidavit; Relators' Ex. 16, Supplemental Affidavits of Kaiser and Zelms; Substitute Brief of Relators at 47-60; Substitute Reply Brief of Relators at 21-28.

(10) The Court's blanket rejection of the Kaiser and Zelms affidavits as post-petition information irrelevant to the second prong of the pretensive joinder test is contrary to Supreme Court precedent and governing law on pretensive joinder permitting submission of post-petition affidavits and evidence to resolve the question of what

information was "available" at the time the petition was filed. *See, e.g., Glick v. Ballentine Produce Inc.*, 396 S.W.2d 609, 612 (Mo. 1965).

(11) The Court's summary rejection of and refusal to consider the Kaiser and Zelms affidavits denies Relators the opportunity to be heard and present evidence on the question whether venue was established by the pleading of false facts. It thus denies Relators the due process of law that is guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 10 of the Constitution of Missouri.

(12) Rehearing is thus warranted with respect to the second prong of the pretensive joinder test because the Court overlooked material facts from the Kaiser and Zelms affidavits and overlooked or misinterpreted material law governing the consideration of such affidavits.

WHEREFORE, Relators respectfully move that the Court vacate its opinion of February 10, 2004, and grant a rehearing in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was mailed by first class United States mail, postage prepaid, to the following counsel of record this 24th day of February, 2004:

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IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ex rel., THE DOE RUN RESOURCES CORPORATION, et al.,	)	
Relators,	)	Cause No. SC85451
vs.	)	
HON. MARGARET M. NEILL, Presiding Judge, Twenty-Second Judicial Circuit, City of St. Louis,	)	
Respondent.	)	

SUGGESTIONS IN SUPPORT OF RELATORS' MOTION FOR REHEARING

Introduction

Relators The Doe Run Resources Corporation et al. ("Relators") seek rehearing of this case pursuant to Missouri Supreme Court Rule 84.17 on the grounds that this Court overlooked and misinterpreted material matters of law and fact, as shown by its opinion of February 10, 2004.

Relators initially brought this prohibition proceeding to challenge a venue determination made in the underlying action, *Doyle v. Fluor Corporation, et al.*, No. 012-8641, by Respondent Hon. Margaret M. Neill, then Presiding Judge of the Circuit Court for the City of St. Louis ("Respondent"). The Court of Appeals for the Eastern District granted a preliminary order in prohibition barring Respondent from taking any further action other than transferring the underlying case to a proper venue, and made that order permanent in an opinion and order of May 20, 2003. This Court granted Respondent's application for transfer on September 30, 2003, thereby vacating the Court of Appeals' May 20, 2003 opinion and order.

On February 10, 2004, this Court denied Relators' request for a permanent writ of prohibition and quashed the preliminary writ previously issued. *See* Slip Opinion dated February 10, 2004 ("Slip op."). In its opinion, the Court held that Relators failed to prove that plaintiffs in the underlying case pretensively joined Marvin Kaiser, who is Chief Financial Officer for defendant The Doe Run Resources Corporation and whose residency in the City of St. Louis is the only alleged nexus with the City. *See id.*

The Court initially determined that Relators had failed to carry their burden of proving pretensive joinder by showing that plaintiffs did not state a cause of action against Kaiser on the face of the petition. The Court stated that, under Missouri law, a corporate officer could be held individually liable for a corporate tort by knowing of the tort and by "participat[ing]" in it. *Id.* at 5. The Court further stated that the allegations of the petition in this case – that Kaiser knew of and "participated" in tortious conduct of Doe Run "by helping to set and then approve budgets that delayed or rejected the implementation of adequate measures for pollution control as well as remediation of properties within the defined area" – were sufficient to state a claim under Missouri law. *Id.* at 5-6.

The Court next determined that Relators had failed to prove that the facts pleaded in the petition against Kaiser were in fact false and that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against Kaiser. *See id.* at 6-7. With respect to this second prong of the pretensive joinder test, the Court entirely disregarded the affidavits of Mr. Kaiser and Doe Run's President, Jeffrey Zelms. The Court stated that "these affidavits were not made until after the plaintiffs filed their petition, and, as

such, were not among the information available at the time the petition was filed." *Id.* at 6.

The Court's opinion overlooks and misinterprets material matters of fact and law with respect to both the first and second prongs of the pretensive joinder test. First, the Court's cursory analysis of the corporate officer liability doctrine in Missouri ignores controlling precedent that requires "*active* participation," not just "participation," in a corporate tort. *See Fusz v. Spaunhorst*, 67 Mo. 256, 264 (Mo. 1878); *Darling & Co. v. Fry*, 24 S.W.2d 722, 723 (Mo. App. 1930). Secondly, the Court misconstrued the law and the facts by disregarding the Affidavits of Mr. Kaiser and of Jeffrey Zelms, Doe Run's President, and reaching factual conclusions that are contradicted by those affidavits and not supported by the record.

Argument

A. Legal Standard for Rehearing

Missouri Supreme Court Rule 84.17 permits a party to seek rehearing within fifteen days after the Court files its opinion, memorandum decision or written order. Rule 84.17(a)(1) provides in part that "[t]he purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its opinion, memorandum decision or written order." Rule 84.17(a)(1) further states that "[r]eargument of issues determined by the court will be disregarded."

B. This Court Should Vacate Its February 10, 2004 Opinion and Grant Rehearing on the First Prong of the Pretensive Joinder Test Because the Court Overlooked or Misinterpreted (1) the Material Matter of Law That Requires "Active Participancy" in a Corporate Tort for Individual Liability to Attach to Corporate Officers and (2) the Material Matter of Fact That the Petition Lacks Any Factual Allegations of "Active Participancy" in a Corporate Tort by Marvin Kaiser.

This Court determined that, under the first prong of the pretensive joinder test set forth in *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 824 (Mo. banc 1994), plaintiffs' petition states a cause of action against Kaiser in his individual capacity that is sufficient to withstand a motion to dismiss based upon alleged pretensive joinder. The Court's analysis is based on the proposition that a corporate officer may be held individually liable for tortious corporate conduct by having knowledge of and by "particip[ing]" in the corporate tort. *See* Slip op. at 5 (citing *Lynch v. Blanke Baer & Bower Krimko, Inc.*, 901 S.W.2d 147, 153 (Mo. App. 1994) and *Grothe v. Helterbrand*, 946 S.W.2d 301, 304 (Mo. App. 1997)). The Court further determined that plaintiffs' allegations of knowledge and "participation" were sufficient to state a cause of action under this test, where plaintiffs alleged that "Kaiser, as the CFO, knew of and participated in Doe Run's tortious conduct by helping to set and then approve budgets that delayed or rejected the implementation of adequate measures for pollution control as well as remediation of properties within the defined area." *Id.*

The Court's analysis ignores controlling precedent requiring more than just mere "participation" in a wrongful act and essentially redefines the standard for individual liability of corporate officers in corporate torts. As this Court stated as early as 1878 with respect to this issue, "[n]othing short of *active participancy* in a positively wrongful act intendedly and directly operating injuriously to the prejudice of the party complaining will give origin to individual liability." *Fusz v. Spaunhorst*, 67 Mo. 256, 264 (Mo. banc 1878). This well-established rule has been followed time and again by the courts. *See, e.g.*, *Darling & Co. v. Fry*, 24 S.W.2d 722, 723 (Mo. App. 1930) ("The rule in Missouri seems to be that in order to make an officer or agent or a corporation liable to a third person, something more must be shown than a mere act of nonfeasance on the part of the agent. . . . It is said that, 'Nothing short of active participancy in a positively wrongful act intendedly and directly operating injuriously to the prejudice of the party complaining will give origin to individual liability.'") (quoting *Fusz*) (internal citation omitted). This Court's current opinion reads this "active participancy" requirement out of Missouri law.

Prior to this Court's opinion in this case, acts performed in the course of corporate duties – such as the budgeting work allegedly performed by Kaiser here – were not considered to constitute "active participancy" under Missouri law. For example, in *Wolfersberger v. Miller*, 327 Mo. 1150 (Mo. 1931), this Court reversed a judgment against the president (McCanless) of two companies who purportedly "participated" in a fraudulent real estate deal. The Court acknowledged evidence that the apartments at issue were erected under the president's direction, that he was a stockholder and president of both companies sued,

that the sale of the real estate at issue was submitted to him (as was practically every sale), and that "no one had the right to dispose of the properties without consulting" him. *Id.* at 1165. However, the Court determined this did not constitute sufficient participation under Missouri law and reversed the judgment, stating that

> none of these matters, in our opinion, tend to show that . . . he (McCanless) was a participant in the conspiracy and fraud. His act in giving consent to the sale . . . and in signing the deeds to the property was the act of the corporation, not his personal act. Nor do we think that McCanless personally may be charged with notice of conspiracy or fraud merely because he was president of the corporation. To hold an officer of a corporation for acts done, it must be shown by evidence of probative force that he had actual or constructive knowledge of the actionable wrong and participated therein.

Id.

Leonard v. St. Joseph Lead Co., et al., 75 F.2d 390 (8th Cir. 1935) similarly followed the Missouri rule for "active participancy" set forth in *Fusz*. In *Leonard*, the Eighth Circuit held that four defendant board members and defendant Doe Run Lead Company had been fraudulently joined in a personal injury suit filed in the City of St. Louis. Much like the instant case, the defendant directors were the only connection to St. Louis, since the property and offices of the defendants (St. Joseph Lead Company and Doe Run Lead Company), as well as the accrual of the cause of action, were in St. Francois and Jefferson Counties. The Court accepted affidavit evidence (filed in opposition to a motion to remand the case to state court) which set forth that the directors "had nothing to do with the

management, operation, manner of conducting or controlling the work of the plaintiff, knew nothing of the conditions under which he worked, and had nothing to do with the actual working of the mine." *Id.* at 395. The Court proceeded to discuss the general rule outlined in *Fusz*, *Wolfersberger*, and *Darling* regarding the limited circumstances in which corporate officers could be held liable for corporate torts and concluded that no cause of action was stated against the individual directors on the face of the petition, such that joinder was fraudulent. *See id.*

Likewise, in *Lynch v. Blanke Baer* (cited by the Court in support of its holding), the Court of Appeals determined that joinder of the company president (Joseph Bryant) was pretensive because plaintiff's petition did not state a cause of action against individual defendant Bryant. Bryant was himself alleged, on the face of the petition, to have fired plaintiff and to have thus "participated" in plaintiff's wrongful discharge. *See* 901 S.W.2d at 153-54. However, consistent with this Court's holding in *Wolfersberger*, the Court concluded as follows:

> When liberally construed, plaintiff's petition does not state facts setting out a cause of action against individual defendant Bryant. There are no allegations that Bryant *individually* participated in the wrongful discharge. Plaintiff's petition clearly states that Bryant was acting for defendant Blanke Baer when he terminated plaintiff. While defendant Bryant may have had actual knowledge of the wrongful discharge, we find that defendant Bryant did not participate in an individual capacity in the discharge.

Id. at 154 (emphasis added). Accordingly, dismissal of Bryant was proper and joinder pretensive.

In contrast, in *Grothe v. Helterbrand* (also cited in support of this Court's holding), the Court of Appeals *affirmed a conversion judgment against the president and* general manager of a corporation. In *Grothe*, the president claimed that he had a "silver bank," encouraged plaintiff to store his silver with him, and assured plaintiff that the silver "would be accessible at any time." In fact, the president admitted that he did not keep plaintiff's silver, that it was "absorbed in to the business," and that he himself directed silver (including plaintiff's silver) to be sold whenever practicable. *See* 946 S.W.2d at 303-304. On these facts, where the individual defendant "*actively participated* in the initial discussions during which Plaintiff was told about the 'silver bank' option," and where the individual defendant was clearly acting outside the scope of legitimate corporate duties, the Court concluded that a jury could have reasonably inferred that defendant Bryant "participated in the misappropriation of Plaintiff's silver by directing that it be sold." *Id.* at 304 (emphasis added).

In the instant case, there are no allegations on the face of plaintiffs' Third Amended Petition which support a claim that Marvin Kaiser individually and actively participated in wrongful conduct outside the scope of his duties as Chief Financial Officer. The allegations here are starkly similar to those in *Lynch*, where the alleged act of firing an employee did not satisfy Missouri's active participancy test, since it was performed as a legitimate part of the corporate role in question. Like defendant Bryant in *Lynch*, Kaiser was alleged to have acted "within the course and scope of [his] agency and employment." Relators' Ex. 8, Third Amended Petition, ¶ 14. Specifically, Kaiser's involvement in setting and approving the pollution control budget is defined to have occurred in his role "[a]s Chief

Financial Officer." *Id.*, ¶ 34. Like the individual directors in *Leonard*, Kaiser was not alleged to have anything to do *with "the management, operation, manner of conducting* or controlling" the operations at the facility in question. And unlike the president and manager in *Grothe*, Kaiser was not alleged to have "actively participated" in or to have directed commission of the tort. *See id.*; *see also* Petition, ¶ 33; Substitute Brief of Relators at 31-44; Substitute Reply Brief of Relators at 4-17.

The Court's opinion of February 10, 2004, ignores Missouri law's well-established and critical distinction between "active participancy" and mere "participation" and further overlooks the lack of factual allegations in plaintiffs' petition to support any claim of "active participancy." The Court's opinion casts aside applicable precedent and expands the scope of individual liability for corporate officers to encompass those persons merely discharging their assigned and legitimate corporate duties. Based upon this disregard of material matters of fact and law, Relators respectfully request the Court to vacate that portion of its opinion on the first prong of the pretensive joinder test and to grant rehearing regarding the same.

C. This Court Should Vacate Its February 10, 2004 Opinion and Grant Rehearing on the Second Prong of the Pretensive Joinder Test Because the Court Overlooked or Misinterpreted (1) the Material Matter of Law That Permits Submission of Post-Petition Affidavits and Evidence in Support of Pretensive Joinder Motions and (2) the Material Matters of Fact that the Affidavits of Marvin Kaiser and Jeffrey Zelms Set Forth Uncontroverted Information Available to the Plaintiffs at the Time of the Petition's Filing and Demonstrate that No Cause of Action Could Be Maintained Against Kaiser.

Under the second prong of the *Malone* pretensive joinder test, this Court determined that Relators had not proven that (a) the facts pled are in fact false and (b) the information available to plaintiffs at the time the petition was filed did not support a realistic belief that a valid claim against Kaiser exists under Missouri law. *See* Slip op. at 7. In so holding, the Court disregarded the affidavits of Kaiser and Zelms, concluding that, because "these affidavits were not made until after the plaintiffs filed their petition," they were not among the "information available at the time the petition was filed." *Id.* at 6 (citing *Malone*, 889 S.W.2d at 825).[1] The Court further stated

[1] The Court's citation to *Malone* as support for the proposition that post-petition affidavits should be ignored is misplaced. *Malone* briefly discussed the second prong of the pretensive joinder test, *see* 889 S.W.2d at 824-825, but almost immediately noted that the *Malone* defendants "do not claim that plaintiffs have pleaded facts that are not true," and therefore concentrated its analysis on the first prong only.

that, because the plaintiffs could point to "specific facts that support their belief that a cause of action existed against Mr. Kaiser at the time the petition was filed, joinder is not pretensive." *Id.* at 6-7 (citing *State ex rel. Hoeft v. Koehr*, 825 S.W.2d 65, 67 (Mo. App. 1992)).

The Court's analysis under the second prong overlooks the numerous decisions permitting and indeed anticipating the submission of post-petition affidavits to resolve this fact-intensive pretensive joinder issue. For example, in *Glick v. Ballentine Produce Inc.*, 396 S.W.2d 609 (Mo. 1965), this Court noted that inquiry into a plaintiff's honest belief might very well necessitate submission of post-petition affidavits and other evidence, explaining:

> In order to establish the venue the plaintiff must, of course, state a cause of action against the resident defendant, but nevertheless if it appears to be clear from the records, pleadings, and facts adduced that the resident defendant cannot be held liable on any reasonable ground or theory, and that plaintiff must be presumed to have known this, the joinder cannot be justified and the cause should be dismissed. . . . On the other hand, if it appears that plaintiff had reason honestly to believe on the facts that he had a joint cause of action against the resident defendant, along with the others, and if he has stated such a cause of action, the case should not be dismissed as based upon a fraudulent joinder. Such motions are presented (or should be) under Rule 55.31; the movant carries the burden of persuasion and, if proof be necessary, the burden of proof. *The cases last cited recognize that a plaintiff may not succeed merely by stating a paper case against the resident defendant and that the court may and should, if need be, look into the facts. If this can*

> *be accomplished by affidavits, well and good; if not, the court may hear evidence.*

Id. at 612 (citations omitted) (emphasis added). Although this Court ultimately reversed the trial court's dismissal of the suit for improper venue, the Court clearly evaluated the facts presented in the post-petition affidavits. *See id.* at 613 (discussing affidavits filed in connection with post-petition motions).

Likewise, in *Frank v. Sinclair Refining Co.*, 256 S.W.2d 793 (Mo. 1953), this Court reversed the trial court's judgment dismissing the case for failure to state a claim and for fraudulent joinder, but first substantively evaluated the post-petition affidavits and evidence submitted by the parties. The Court note [sic] that the individual defendants (Ogle and Shoemaker) submitted affidavits in support of their motions to dismiss, indicating that neither of them were employees of the corporate defendant Sinclair. *See id.* at 795. Plaintiffs offered in evidence the depositions of the two individual defendants as well as certain documentary evidence showing that Ogle was Sinclair's employee. After evaluating the entire record, the Court concluded that "the petition certainly stated a cause of action and the status of Ogle and Sinclair was not so plain upon this record that it could be declared as a matter of law," such that dismissal for fraudulent joinder and lack of proper venue was in error. *Id.* at 799.

In *Lichterman v. Crockett*, 331 S.W.2d 607 (Mo. 1960), this Court again confronted a fraudulent joinder situation and considered affidavits submitted with the defendants' motions to dismiss as well as controverting affidavits filed by plaintiff. Ultimately concluding that joinder was not

pretensive based in principal part on plaintiff's controverting affidavits, the Court first set forth in detail the importance of such affidavits in preserving the pretensive joinder inquiry:

> "It has been said, however, that '*It would be a very dangerous doctrine, indeed, and one utterly destructive of the valuable rights conferred upon litigants* by Section 871, RSMo 1939, Mo. RSA § 871, *if this court should countenance a practice whereby a plaintiff could, by stating a paper case against the resident defendant, force a nonresident to submit to the jurisdiction of the court, when in truth and in fact the plaintiff had no cause of action against the resident defendant*, either because no factual basis could exist to support an honest belief on plaintiff's part that he had a cause of action against the resident defendant, or that upon the conceded facts, as in the case at bar, no action could be brought against him. *When the issue is raised by a proper plea, as was done in the instant case, the court should look behind the mere ingenuity of pleading, and scrutinize the facts to ascertain the propriety of the joinder of the defendants.' Diehr v. Carey*, 238 Mo. App. 889, 191 S.W.2d 296, 300. Moreover, Section 509.290 provides that '1. The following objections and other matters may be raised by motion whether or not the same may appear from the pleadings and other papers filed in the cause: * * * (2) Lack of jurisdiction over the person; (3) improper venue; * * *. 2. *The grounds of any of the above may be supplied by affidavit and may be controverted by opposing affidavit* * * *.

Id. at 608-609.

Following this Court's lead, other Missouri courts have continued to consider the entirety of the record in evaluating whether a plaintiff was entitled to a reasonable belief that she had a justiciable claim against the defendant who alleges pretensive joinder. For example, in *State of Missouri ex rel. Kyger v. Koehr*, 831 S.W.2d 953 (Mo. App. 1992), the Court of Appeals found pretensive joinder where defendants submitted uncontroverted affidavits to their post-petition motions stating that (1) the individual defendant was not the manager on duty at the time of the alleged incident and therefore could not be held liable and (2) the corporate defendant was not located in the City of St. Louis. *See id.* at 956. By contrast, the Court of Appeals in *Bottger v. Cheek*, 815 S.W.2d 76 (Mo. App. 1991) found no pretensive joinder based on the submissions by plaintiff of a pre-trial statement and a *post-trial* affidavit, which were sufficient to show that the information available to plaintiff at the time the original action was filed met the objective reasonable belief standard under Missouri law. *See* 815 S.W.2d at 80-81 (noting that the non-resident defendant can prove the alleged facts "are not true and cannot be proven . . . through testimony, affidavits, depositions, interrogatories, requests for admissions, or other evidence" and that plaintiff "may counter such proof by coming forward with evidence demonstrating that, at the time the action was commenced, he had reason to believe the facts alleged against the resident defendant were true and capable of proof at trial."). Similarly, the Court of Appeals in *Rakestraw v. Norris*, 478 S.W.2d 409 (Mo. App. 1972), evaluated post-petition depositions and interrogatories to determine the result under the second prong of the pretensive joinder test. *Id.* at 416. Concluding that "joinder was not fraudulent or pretensive as claimed," the Court explicitly held that "we must consider the whole

record – to the time the motion was heard, at least – to decide whether or not plaintiff was entitled to a reasonable belief that under the law and the evidence she had a justiciable claim against Mr. Goodman." *Id.* at 415.

The cases are uniform in this regard: affidavits and other evidence made after the time of the filing of the petition can be offered to and used by the court in determining what information was available to the plaintiffs at the time of the petition's filing. This is a substantive inquiry that does not discount evidentiary material merely on the basis of its execution date, as the Court cursorily did here. Instead, the trial court must examine all of the evidence offered and determine what information was *available*, not what information was actually *known* to the plaintiffs. Failure to preserve such an inquiry would in effect eliminate the second prong from the pretensive joinder test, as defendants would never be able to offer post-petition affidavits or other evidence to prove that the facts pled are in fact false. This Court's opinion, as written, effectively nullifies this prong of the pretensive joinder test by turning a blind eye to all post-petition affidavits, no matter the relevancy of their content to the issues in question, including the objectivity of a plaintiff's "reasonable" belief.

In this case, Relators presented affidavits from Kaiser and Zelms, which set forth in detail the duties, responsibilities, and actions of Kaiser as Chief Financial Officer of Doe Run. *See* Relators' Ex. 9, Tab J, Kaiser Affidavit; Relators' Ex. 12, Zelms Affidavit; Relators' Ex. 16, Supplemental Affidavits of Kaiser and Zelms. These affidavits stand uncontroverted by any of the evidence relied upon plaintiffs in opposition to Relators' motion, as examination of each document shows and as is set forth in detail at

pages 47 to 60 of Relators' Substitute Brief and pages 21 to 28 of Relators' Substitute Reply Brief.[2] Plaintiffs offered no contradictory affidavits or evidence other than the thirty-two exhibits previously discussed which themselves do not tend to prove the facts that plaintiffs plead.

Further, there is no question that the information contained in these affidavits was *available* to the plaintiffs. As was discussed in Relators' Substitute Brief at pages 11, 12, 13, and 48, the same plaintiffs had more than six years from the initiation of the *Dixon v. Doe Run et al.* case in Jefferson County to conduct discovery and research to determine Kaiser's role at Doe Run. In the course of the *Dixon* case, Doe Run furnished to plaintiffs more than 69,000 documents, comprising hundreds of thousands of pages. *See* Relators' Ex. 16, Doe Run's Reply, at 11. Kaiser and Zelms (and others within the company) were *available* for deposition regarding Kaiser's role within Doe Run; thus their "information" about Kaiser's role was *available* to plaintiffs.

Plaintiffs could have questioned Doe Run in deposition, in interrogatories, or in requests for admissions

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[2] The Court cites *Hoeft* for the proposition that, where the plaintiffs can point to "specific facts" that support their belief that a cause of action existed at the time the petition was filed, "joinder is not pretensive." Slip op. at 6-7. In fact, *Hoeft* does not so hold, as is evident from reading the cited portion in its proper context. *Hoeft* simply recognizes that, unlike *Bottger v. Cheek*, 815 S.W.2d 76 (Mo. App. 1991), where the total information available to plaintiff at the time of the filing supported a realistic belief in a justiciable claim, there was insufficient information available to the *Hoeft* plaintiff to support a realistic belief that a justiciable claim existed against Union Electric at the time of filing and therefore joinder was pretensive and venue was improper. 825 S.W.2d at 66-67.

regarding Kaiser's role. Instead, plaintiffs never attempted any such discovery, apparently preferring instead not to know the truth. To discourage such head-in-the-sand tactics, courts judge a plaintiff's realistic and objective belief by the standard of "information available," not information actually known. Moreover, as demonstrated above, Missouri courts engage in an intensive inquiry into the specific facts presented regarding information available to plaintiffs at the time of the petition's filing. Such an inquiry did not occur in the trial court and is not apparent in the Court's present ruling. Indeed, under the Court's opinion, such an inquiry will likely never occur again, as defendants are all but precluded from proving the facts alleged to be false on anything but pre-petition evidence, in contravention of prior authority and this Court's own warnings of the "danger" and "destructive nature" of such a plaintiff-friendly practice. This Court's opinion does not address Relators' argument that, on the facts of this case where Plaintiffs had ample opportunity for discovery prior to adding the resident defendant, "information available" includes information that could have been obtained by conducting that discovery.

While it disregards the affidavits tendered by Relators, the Court accords controlling weight to the documents tendered by Plaintiffs in opposition to Relators' venue motion. As the Court states, "These exhibits included information on general environmental conditions around the smelter as well as specific budget decisions regarding environmental matters" (slip op. at 7). The Court then assumes something the documents themselves do not establish and the affidavits refute: that Mr. Kaiser was involved in the budget decisions in question. "As the CFO, Mr. Kaiser was or likely was involved in these

decisions" (Id.) In drawing this conclusion, the Court appears to be affording deference to the conclusions drawn by Plaintiffs' counsel from the documents. While such deference might be appropriate in applying the first prong of the test for pretensive joinder, under which the pleader is to be given the benefit of all reasonable inferences that can be drawn from the facts pleaded, it is inappropriate in applying the second prong.

The second prong of the pretensive joinder standard is an objective test. *Malone*, 889 S.W.2d at 824 ("We have since held that a mere honest belief is not enough; the test for pretensive joinder is an objective one, requiring "a *realistic* belief that under the law and the evidence a valid claim exists.") (emphasis added). Viewing the entire record here objectively rather than according deference to conclusions unreasonably drawn by Plaintiffs' counsel from the documents, it is clear that Relators have sustained their burden under the second prong of the test.

D. This Court Should Vacate Its February 10, 2004 Opinion and Grant Rehearing on the Second Prong of the Pretensive Joinder Test Because by Refusing to Consider the Affidavits Tendered by Relators in Support of their Motion to Dismiss or Transfer the Court has denied Relators Due Process of Law in Violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 10 of the Constitution of Missouri.

As shown above, Missouri law recognizes the right of a defendant not to be subjected to suit in a county where no defendant resides and the plaintiff's claim did not accrue.

This right cannot be defeated by false pleading. A plaintiff cannot "by stating a paper case against the resident *defendant, force a nonresident to submit to the jurisdiction* of the court, when in truth and in fact the plaintiff had no cause of action against the resident defendant" *Glick v. Ballentine Produce Inc., supra.*

This right is a hollow one, however, if defendants are to be denied the means of proving that [sic] that "in truth and in fact" the plaintiff had no cause of action against the resident defendant. The Court's holding that the affidavits of Mr. Kaiser and Mr. Zelms are to be disregarded accomplishes exactly that. It takes out of defendants' hands the only tool that defendants have to prove the falsity of the facts pleaded: sworn testimony, given by affidavit, that the pleaded facts are false.

Affidavits of the kind at issue here by definition cannot be prepared until after a petition is filed purporting to assert a claim against the resident defendant. Until the false pleading is filed, the defendant has no knowledge of what claim is to be made against him or her, and no reason to prepare an affidavit refuting those facts. To disregard those affidavits as prepared too late because they are prepared after the petition, then, is to deny the defendant the means of asserting the second prong of the test for pretensive joinder.

The opportunity to be heard is fundamental to due process under the Fourteenth Amendment to the Constitution of the United States. *Boddie v. Connecticut*, 401 U.S. 371, 378, 28 L.Ed.2d 113, 199, 91 S.Ct. 780 (1971); *Saunders v. Shaw*, 244 U.S. 317, 320, 61 L.ED. [sic] 1163, 1165,-66, 37 S.Ct. 638, 640 (1917). Whether due process has been afforded is necessarily determined based on the laws in

effect at that [sic] the time of the claim. *Findley v. City of Kansas City*, 782 S.W.2d 393, 398 (Mo. banc 1990).

The Court's ruling precluding the use of affidavits here denies Relators the opportunity to be heard on the question whether Plaintiffs are proceeding based on false pleading of facts. The Court has recognized "the valuable rights conferred upon litigants" by our venue laws. *Lichterman v. Crockett, supra*, 331 S.W.2d at 608. The Court's ruling deprives defendants of the opportunity to adduce the only competent evidence that could be advanced in support of the right not to be sued in a court where venue can be established only by false pleading. When a State Supreme Court denies a defendant the opportunity to present evidence in defense of a claim, due process is denied. *Saunders v. Shaw, supra.* When, as here, the denial first occurs near the end of the proceedings, at the time of the ruling of the state Supreme Court, the claim of constitutional error is preserved if presented to the state Supreme Court on application for rehearing. *Id.*

This Court by its opinion denies Relators the right to be heard on the venue question by excluding the affidavits necessary to sustain the merit of Relators' position. Its action constitutes an implicit reversal of prior Missouri decisions permitting the use of affidavits on pretensive joinder issues. The Court's action therefore denies Relators due process under both the federal and state constitutions.

In summary, the Court's opinion of February 10, 2004, ignores Missouri law's well-established practice of accepting and utilizing post-petition affidavits and evidence to determine whether the second prong of the pretensive joinder test has been satisfied and, as a result, wholly ignores the uncontroverted facts set forth in the Kaiser

and Zelms affidavits regarding Kaiser's lack of active participancy in any corporate tort. Based upon this disregard of material matters of fact and law, and the consequent denial of due process, Relators respectfully request the Court to vacate that portion of its opinion on the second prong of the pretensive joinder test and to grant rehearing regarding the same.

Conclusion

For the foregoing reasons, Relators The Doe Run Resources Corporation et al. respectfully request that this Court vacate its opinion dated February 10, 2004, and grant a rehearing in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was mailed by first class United States mail, postage prepaid, to the following counsel of record this 24th day of February, 2004:

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STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
CITY OF ST. LOUIS

JAMES DOYLE, et al.,	)	
	)	
Plaintiffs,	)	Cause No. 012-08641
vs.	)	Division No. 1
	)	
FLUOR CORPORATION, et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court are defendant Marvin Kaiser's motion to dismiss for failure to state a cause of action and Defendants' motions to transfer for improper venue based on the pretensive joinder of Mr. Kaiser. The Court rules as follows.

Plaintiffs have brought the present action for damages to their real property in Herculaneum, Missouri, as a result of the release of heavy metals and other substances from the Doe Run Lead Smelter, owned and operated by Defendants. Plaintiffs have alleged the transactional history among defendant Fluor and its partners, joint venturers, and subsidiaries, which at various times have included St. Joe Minerals Corporation, Homestake Lead Company of Missouri, A. T. Massey Coal Company, Inc., Doe Run Investment Holding Company (DRIHC), and Leadco Investment. In 1990 Doe Run Company was a general partnership composed of three wholly owned Fluor

subsidiaries: DRIHC, Leadco, and St. Joe Minerals. Since that time, the subsidiaries have merged and acquired other corporate entities.

Plaintiffs allege in their third amended petition, filed December 11, 2001, that Mr. Kaiser is the vice-president and chief financial officer (CFO) of defendant Doe Run Resources Corporation, that he was acting at all times jointly and in conspiracy with co-defendants and other unnamed co-conspirators, and that he has an economic motive and personally benefited from the conspiracy. The alleged objectives of the conspiracy were to inadequately control emissions, which Defendants knew were being deposited on Plaintiffs' property, to violate the Ambient Air Quality Standard, and to fail to implement pollution controls, with the purpose of bolstering Defendants' profits, bonuses, wages, value, and stock options. Mr. Kaiser allegedly knew of and participated in the alleged acts and omissions.

Plaintiffs allege that Mr. Kaiser's duties include budgeting and the approval of expenditures for pollution control equipment and measures, for purchase of contaminated properties around the smelter area, and for remediation of properties. He also allegedly had and exercised authority to represent financial assurance to the State for purposes of compliance with state environmental laws. Plaintiffs claim that Mr. Kaiser's exercise of his responsibilities, together with his knowledge of the remediation and emissions release capabilities of the Doe Run Smelter, was tantamount to participation in actionable tortious conduct.

Defendants have timely filed motions in which they present evidence that venue is premised solely on Mr.

Kaiser's residence in the City of St. Louis. Defendants contend that Mr. Kaiser was pretensively joined and that the third amended petition fails to state a cause of action against him as an officer of defendant Doe Run Resources Corporation and Doe Run Company.

Specifically, Mr. Kaiser contends that the allegations of conspiracy are conclusory, that they fail to allege that he had any responsibility for environmental compliance, and that the facts alleged do not bring Mr. Kaiser within any exception to the rule that a principal and agent cannot act as co-conspirators. In their separate venue motions, Defendants assert that the third amended petition fails on its face to state a cause of action against Mr. Kaiser, the sole resident defendant, and, alternatively, that there was no objectively reasonable basis for a claim against Mr. Kaiser at the time suit was filed.

Defendants have attached the affidavits of Mr. Kaiser and of Barbara Shepard, the vice president of human resources for Doe Run Resources Corporation. Mr. Kaiser states that he joined Doe Run Company as CFO in December 1993, that he has no authority over corporate officers and employees who are responsible for environmental affairs, that he has never passed judgment on or failed to approve an authorization for environmental expenditures, and that he makes no decisions with respect to the implementation of pollution controls at the Doe Run Smelter. Ms. Shepard states that Mr. Kaiser is the sole Doe Run employee who resides in the City of St. Louis.

Plaintiffs counter that they have alleged that Mr. Kaiser had actual or constructive knowledge of Doe Run's conduct and participated in it, and therefore have sufficiently stated a cause of action against Mr. Kaiser for his

participation in tortious activity. Plaintiffs further state that Mr. Kaiser may be held jointly liable because he conspired with multiple corporations other than Doe Run, as well as with three other individuals, with the objective of violating the Ambient Air Quality Standards, resulting in release of toxic materials onto Plaintiffs' property.

A motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiff's petition. The Court assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. *Murphy v. A. A. Mathews, a Division of CRS Group Engineers, Inc.,* 841 S.W.2d 671, 672 (Mo.banc 1992). No attempt is made to weigh any facts as to whether they are credible or persuasive. Instead, the petition is reviewed to see whether the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. *Nazeri v. Missouri Valley College,* 860 S.W.2d 303, 306 (Mo.banc 1993). A pleading is judged by its subject matter and not its caption. *Worley v. Worley,* 19 S.W.3d 127 (Mo. 2000).

By contrast, venue is pretensive if (1) on its face the petition fails to state a cause of action against the resident defendant or (2) there is in fact no claim against the resident defendant. *Pataky v. Missouri Hwy. and Transp. Comm'n,* 891 S.W.2d 457, 460 (Mo.App. W.D. 1994). In the latter case, joinder is pretensive if the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against the resident defendant. *Id.* A "reasonable legal opinion" is an objective standard, referred to as a realistic belief that a valid claim exists under the law and the evidence. *State ex rel. Cross v. Anderson,* 878 S.W.2d 37, 38 (Mo.banc 1994).

The standard for determining whether a petition states a claim for the purpose of establishing venue is less stringent than that required to sustain a motion for summary judgment or a motion to dismiss for failure to state a claim. *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 825 (Mo. 1994). However, the party claiming pretensive joinder bears both the burden of proof and the burden of persuasion. *Id.* at 824.

Plaintiffs have asserted claims against Defendants for negligence and negligence per se, strict liability, nuisance, and trespass. Although Plaintiffs allege a conspiracy as a basis for joint liability, they have alleged no separate count to recover on the theory of civil conspiracy. Civil conspiracy alone is not typically actionable; one or more of the alleged conspirators must have committed a wrongful act, and the fact of a conspiracy merely bears on the liability of the various defendants as joint tortfeasors. *Mccke Laundry Service L.P. v. Jetz Service Co.*, 931 S.W2d 166, 175 (Mo.App. W.D. 1996). An identity between agent and principal leads to a legal impossibility, because two entities that are not legally distinct cannot conspire with each other. *Id.* at 176. Plaintiffs have alleged in conclusory terms that Mr. Kaiser acted in self-interest beyond the agency relationship.

However, a corporate officer acting in such capacity may be held personally liable for corporate wrongdoing if the officer had actual or constructive knowledge of the wrongdoing and participated in an actionable wrong. *Constance v. B.B.C. Development Co.*, 25 S.W.3d 571, 590 (Mo.App. W.D. 2000); *Osterberqer v. Hires Const. Co.*, 599 S.W.2d 221 (Mo.App. E.D. 1980). Plaintiffs have sufficiently alleged that Mr. Kaiser knew of the environmental goals and the budget for the smelter, and, with this knowledge,

approved budgets that would reject or delay the implementation of appropriate pollution control methods, thereby violating pollution standards. Plaintiffs have adequately pleaded a basis for liability on the part of Mr. Kaiser. For purposes of Mr. Kaiser's motion and Defendants' venue motion, the petition on its face states a cause of action against Mr. Kaiser.

The remaining issue, for purposes of Defendants' venue motions, is whether there was, at the time suit was brought, information that would support reasonable legal opinion that a claim existed as to Mr. Kaiser as the CFO of Doe Run. Defendants state that while Mr. Kaiser had authority to authorize expenditures, he was not responsible for deciding which expenditures should be made. Plaintiffs state that at the time suit was brought, they were aware that Mr. Kaiser was an officer responsible for authorizing expenditures and budgeting necessary costs.

As indicated above, Mr. Kaiser remains a defendant in this case, and the claim against him remains pending. Further, on the basis of the record before it, the Court finds that the information available to Plaintiffs at the time suit was brought supports a realistic belief that a valid claim against Mr. Kaiser exists under Missouri law.

ORDER

WHEREFORE, IT IS ORDERED that defendant Marvin K. Kaiser's Motion to Dismiss and Defendants' Motions to Dismiss or Transfer for Improper Venue are hereby denied.

SO ORDERED:

/s/ Margaret M. Neill
Margaret M. Neill, Presiding Judge

Dated: July 16, 2002

cc: Jeffrey J. Lowe, Attorney for Plaintiffs
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Kevin S. Harmon, Attorney for Plaintiffs
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John R. Musgrave, Attorney for Defendant Homestake
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No. 04-5

Supreme Court, U.S.
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In The
Supreme Court of the United States

THE DOE RUN RESOURCES CORPORATION,
DR ACQUISITION CORPORATION,
and MARVIN KAISER,

Petitioners,

vs.

THE HONORABLE MARGARET M. NEILL,
PRESIDING JUDGE, TWENTY-SECOND JUDICIAL
CIRCUIT, CITY OF ST. LOUIS, MISSOURI,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Missouri

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Due Process Clause of the Fourteenth Amendment to the United States Constitution violated where there is no state created right to a particular venue and where the state court considered Petitioners' post-filing affidavits and determined that they did not overcome Plaintiffs' adequate showing under decisional Missouri law that they had a realistic belief under the law and evidence that a valid claim against the joined defendant existed at the time of filing?

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CITATION OF REPORTS OF OPINIONS ENTERED IN THE CASE

The Opinion of the Missouri Supreme Court is reported at *State ex rel. The Doe Run Resources Corporation, et al. v. Neill*, 128 S.W.3d 502 (Mo. 2004) (en banc). The order of the Missouri Supreme Court overruling Relators' Motion for Rehearing is also reported at 128 S.W.3d 502. The now-vacated opinion of the Court of Appeals for the Eastern District of Missouri ("Missouri Court of Appeals") is reported at *State of Missouri, ex rel. The Doe Run Resources Corp. v. Neill,* No. ED81573, 2003 Mo. App. Lexis 745 (Mo. Ct. App. May 20, 2003).

NO BASIS FOR SUPREME COURT JURISDICTION

Respondents do not concede that this Court has jurisdiction to consider the Petition for a Writ of Certiorari. This case does not involve the validity of any treaty or statute of the United States or the validity of a statute of any State. In the absence of any such claims, 28 U.S.C. § 1257(a) grants this Court authority to review a decision of the Missouri Supreme Court only "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

Petitioners assert that a repealed statute of Missouri establishes a state-created due process right they have been denied. Because the statute has been repealed by a Missouri Supreme Court Rule, and other reasons, there is no state-created due process right. Therefore, Petitioners have no colorable due process claim under the United

States Constitution that would provide the legal predicate for this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty or property without due process of law . . . [.] U.S. CONST., amend, XIV, § 1.

MO. CONST. ART. V, § 5

MO. REV. STAT. § 508.010 (2000)

MO. REV. STAT. § 509.290 (2000)

MO. R. CIV. P. 51.045 (effective until June 1, 2004)

MO. R. CIV. P. 55.27 (2004)

MO. R. CIV. P. 55.31 (1965) (repealed)

The text of these statutes appear in Appendix 1.

REASONS THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I. Introduction.

Petitioners filed a pretensive joinder motion claiming that Plaintiffs' state court petition (complaint) pleaded erroneous facts in order to obtain venue in the City of St.

Louis, Missouri against Marvin Kaiser, the Doe Run Resources Corporation Chief Financial Officer and a resident of the City of St. Louis.[1]

Petitioners asserted their purported due process claim for the first time on Motion for Rehearing in the Missouri Supreme Court. Because Petitioners waited to assert their due process claim until the Motion for Rehearing, Petitioners procedurally waived their due process claim. This Court does not have jurisdiction to consider Petitioners constitutional claims.

Under settled Missouri law, a movant claiming erroneous-fact pretensive joinder cannot prevail unless the movant meets two tests: first, the movant must show that the record, pleadings, and facts presented in support of the motion asserting pretensive joinder establish that there is in fact no cause of action against the joined defendant because the pleadings contain false facts ***and***, second, the movant must show that the information available to plaintiffs at the time the petition was filed would not support a reasonable opinion that a case could be made against the joined defendant. *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 825 (Mo. 1998) (en banc) (emphasis supplied).

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[1] Petitioners are inaccurate in their Statement of the Case. They claim that Plaintiffs initially filed their claims in 1995. While there was a 1995 action, it was brought by three plaintiffs and was properly dismissed by those plaintiffs under Missouri law. The present action, brought by those and five additional plaintiffs not a part of the 1995 action, pertains to a differently defined class, including subclasses, with a different set of defendants, and is based in part on new facts that came to light since the 1995 suit.

In support of an erroneous-fact pretensive joinder motion, a defendant may submit evidence, including affidavits, showing that the alleged facts are not true and cannot be proved. *Bottger v. Cheek*, 815 S.W.2d 76, 80 (Mo. Ct. App. 1991). The plaintiff may counter with evidence demonstrating that plaintiff had a realistic belief at the time the action was filed that the facts pleaded against the resident defendant were true and capable of proof. *Id.* Both the trial court and the Missouri Supreme Court followed this procedure.

The plaintiff's venue choice prevails unless the plaintiff did not have a "realistic belief that under the law and the evidence a [valid] claim exists." *State ex rel. Shelton v. Mummert*, 879 S.W.2d 525, 527 (Mo. 1994) (en banc) (citation omitted). "The fact this belief is subsequently discovered to be erroneous is irrelevant provided the information available at the time of filing was such as to give rise to a reasonable legal opinion that a submissible case could be made against the resident defendant." *Bottger*, 815 S.W.2d at 80. The party claiming pretensive joinder has the burden of proof and persuasion. *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 (Mo. 1996).

The Missouri Supreme Court did not ignore Petitioner's affidavits. The court noted that "[t]o refute plaintiffs' allegations, Relators included the affidavits of Mr. Kaiser and another corporate officer." *State ex rel. The Doe Run Resources Corporation, et al. v. Neill*, 128 S.W.3d 502, 505 (Mo. 2004) (en banc); Pet. App. 6. Instead, the Missouri Supreme Court simply concluded that the information contained in the affidavits was not among the information available to the Plaintiffs at the time the petition was filed and did not defeat Plaintiffs' adequate showing of their realistic belief at the time of filing that a valid claim existed against Mr. Kaiser. *Id.* at 506; Pet. App.

7. Because Petitioners did not meet the *Malone* test to establish erroneous-fact pretensive joinder, the Missouri Supreme Court upheld the trial court's determination that venue was proper. *Id.*

The due process claim asserted in this Court was raised for the first time on Motion for Rehearing before the Missouri Supreme Court. Moreover, Petitioners did not refer to or cite MO. REV. STAT. § 509.290 (2000) at any stage of the state court proceedings. Petitioners, therefore, procedurally waived their opportunity to raise their constitutional claims by failing to assert such claims in a fairly precise and timely manner in the state courts.

Finally, the Missouri statute upon which Petitioners now rely, MO. REV. STAT. § 509.290, was not the law of Missouri at any time relevant to this case. In the absence of a state-created due process right, this Court has not recognized a due process right to have a civil case tried in a particular venue chosen by state law. This case fails to provide a sufficient predicate for this Court to recognize a free standing right to a specific civil venue in the Due Process Clause of the Fourteenth Amendment.

The Petition for a Writ of Certiorari should be denied.

II. Petitioners Procedurally Waived Their Due Process Claim.

Petitioners asserted their due process claim for the first time on Motion for Rehearing before the Missouri Supreme Court. Pet. App. 35, 53 – 55. Petitioners cited no statutory basis for this claim in the state courts.

"[T]he general rule [is] that a constitutional question is urged too late, if put forward for the first time upon a

petition for rehearing." *American Surety Co. v. Baldwin*, 287 U.S. 156, 164 (1932).

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), and the aggrieved party bears the burden of defeating this assumption, *ibid.*, by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here,' *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Adams v. Robertson, 520 U.S. 83, 86-87 (1997). Petitioners thus bear the burden of demonstrating that they presented the federal constitutional claim with "fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 61, 63 (1928); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n. 9 (1980).

In first raising their due process argument on their Motion for Rehearing, Petitioners there merely stated that *Lichterman v. Crockett*, 331 S.W.2d 607, 608 (Mo. 1960) recognized "a valuable right conferred upon litigants" by Missouri venue laws that, if not honored, denies due process.[2] Pet. App. 54. Petitioners failed to inform the Missouri Supreme Court of their argument that § 509.290 constitutes a state-created due process right.

Petitioners now attempt to excuse their untimely and imprecise assertion of their purported due process claim by arguing that the Missouri Supreme Court's opinion

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[2] As discussed, *infra*, *Lichterman* no longer correctly states Missouri law.

"surprisingly reversed a long-established course of accepting post-petition affidavits," citing *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. at 85, n. 9. Pet. 7.

There can be no credible claim that the Missouri Supreme Court's decision altered Missouri law. Both the trial court and the Missouri Supreme Court followed settled Missouri law. *State ex rel. Malone v. Mummert*, 889 S.W.2d 822 (Mo. 1998) (en banc); *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 (Mo. 1996) (en banc); *State ex rel. Shelton v. Mummert*, 879 S.W.2d 525, 527 (Mo. 1994) (en banc); *State ex rel. Coca-Cola v. Gaertner*, 681 S.W.2d 445, 447 (Mo. 1984) (en banc), *overruled on other grounds by State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820 (Mo. 1994); *Bottger v. Cheek*, 815 S.W.2d 76 (Mo. Ct. App. 1991), and *State ex rel. Toastmaster v. Mummert*, 857 S.W.2d 869, 871 (Mo. App. 1993).

Nor is there a valid claim of surprise. Indeed, Petitioners fail to note that they presented the affidavits to the trial court and the trial court reached the same legal conclusion as did the Missouri Supreme Court. The trial court's written order noted the affidavits, noted their contents, applied the settled law and concluded: "[T]he Court finds that the information available to Plaintiffs at the time suit was brought supports a realistic belief that a valid claim against Mr. Kaiser exists under Missouri law." Pet. App. 63. If any basis for a constitutional challenge to Missouri law existed (and it does not), it existed at the time the trial court issued its order. Petitioners, therefore, had an obligation to raise their due process claim at the first opportunity after the trial court's order – not for the first time on Motion for Rehearing after opinion by the Missouri Supreme Court. Their failure to do so is a procedural default.

Application of this Court's "fair precision" standard also requires rejection of the Petition for Certiorari. Although it is the statute Petitioners claim creates their purported state-created due process right, Petitioners never mentioned MO. REV. STAT. § 509.290 in any paper filed with any state court. Instead, Petitioners first mention § 509.290 in the Petition for Certiorari. This is too late to warrant this Court's consideration of Petitioners' purported due process claim.

Even when Petitioners raised the federal constitutional claim for the first time on Motion for Rehearing, they failed to cite the statute upon which they now rely. Thus, Petitioners failed to raise the federal constitutional question with fair precision and in due time. The Petition for Certiorari should be denied for this wholly sufficient reason.

III. The Missouri Supreme Court Did Not Disregard the Affidavits in Question and So Did Not Deny Any Due Process Rights of Petitioners.

The Missouri Supreme Court decision does not deny Petitioners the opportunity to present post-petition affidavits nor does it prohibit a court from considering those affidavits. Instead, the Missouri Supreme Court decision merely applies settled law and concludes that Petitioners' affidavits fail to overcome Plaintiffs' adequate showing of counsels' realistic belief of a valid claim at the time of filing the state court action. "The only relevant inquiry is whether the records and pleadings support a realistic belief that there is a claim against Mr. Kaiser." *State ex rel. The Doe Run Resources Corp. v. Neill*, 128 S.W.3d 502, 506 (Mo. 2004) (en banc); Pet. App. 7.

Petitioners acknowledge that where the post-petition affidavits are considered and deemed insufficient to rebut Plaintiffs' venue allegations, due process rights are not denied. Pet. 9, n. 1. That is precisely what happened in this case.

That Petitioners' affidavits did not speak to the critical issue necessary to determine pretensive joinder may be a failure, but it is not a failure of due process for a court to recognize the affidavits' inadequacies. Petitioners' claimed basis for a violation of due process does not exist and the Petition should be rejected.

IV. Mo. Rev. Stat. § 509.290 (2000), the Statute Upon Which the Petitioners Rely to Establish Their Claim That the Supreme Court of Missouri's Decision Violates the Due Process Clause in This Case, Is No Longer the Law of Missouri and Was Not the Law of Missouri at Any Time Relevant to This Cause of Action.

Petitioners assert for the first time in this Court that a specific statute, Mo. Rev. Stat. § 509.290 (2000), provides a state-created due process right to present affidavits in support of a motion for improper venue. Section 509.290 does not provide a basis for this Petition, for at least two reasons. First, § 509.290 applies to motions asserting improper venue, not motions asserting pretensive joinder. Second, § 509.290 no longer states the law of Missouri for purposes of a motion for improper venue.

With exceptions not relevant here, venue in Missouri is generally founded on the residence of the defendant or the place the cause of action accrued. *See* Mo. Rev. Stat. §§ 508.010, et seq. (2000). A motion for improper venue asserts that the case is brought in the wrong venue based

on the venue statutes, that is, that the defendant cannot be sued in that venue. The improper venue motion simply asks the court to apply venue criteria set forth in § 508.010, et seq.

A pretensive joinder motion is an altogether different motion than a motion for improper venue and, for that reason, MO. REV. STAT. § 509.290 does not apply to the pretensive joinder motion filed by Petitioners. The Petitioners' pretensive joinder motion necessarily admits that venue would be proper under § 508.010 against the named defendant in the county in which the case is filed if plaintiffs have stated a cause of action against the defendant. Instead, a pretensive joinder motion addresses the reasonable basis of the factual pleadings in the state court petition as known to the plaintiff at the time the suit was filed.

Petitioners admit that the vitality of the due process claims of the Petition for Certiorari depends on § 509.290 properly stating the law of Missouri. Petitioners' inaccurate "Question Presented for Review" assumes an "independent, state-created right to present such affidavits to challenge the propriety of venue." Pet. i. The Motion for Rehearing filed with the Missouri Supreme Court admits: "Whether due process has been afforded is necessarily determined based on the laws in effect at that [sic] time of the claim." Pet. App. 53-54.

Petitioners' due process claim is without merit as § 509.290 did not state the law of Missouri at any time relevant to the motions below. Where there is no "state-created right" that is the sole legal foundation of Petitioners' due process claim, there is no basis for this Court to grant certiorari.

Under the 1976 amendments to the Judicial Article of the Missouri Constitution, "[t]he supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law." MO. CONST. ART. V, § 5.[3] The Missouri Supreme Court interprets this constitutional provision as follows:

> The Missouri Constitution of 1945 authorized the Supreme Court to "establish rules of practice and procedure for all courts." MO. CONST. ART. V, § 5. In 1976, the citizens of Missouri amended article V so that those rules "shall have the force and effect of law." *Id.* Consequently, rules promulgated pursuant to article V, § 5 "superseded all statutes and existing court rules inconsistent therewith," Rule 41.02; if there is a conflict between this Court's rules and a statute, the rule always prevails if it addresses practice, procedure or pleadings. *Reichart v. Lynch*, 651 S.W.2d 141, 143 (Mo. 1983) (en banc).

State ex rel. Union Electric Co. v. Barnes, 893 S.W.2d 804, 805 (Mo. 1995) (en banc).

MO. R. CIV. P. 51.045 established the specific procedure at the time this action was filed. It makes no provision for the use of affidavits. MO. R. CIV. P. 51.045 controls the procedure for challenging improper venue, not § 509.290.[4]

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[3] The 1976 amendments took effect January 2, 1979. MO. CONST. Art. V, § 27. This case was filed in July, 2001.

[4] Section 509.290 was adopted and last addressed by the Missouri General Assembly in 1943.

Petitioners' Petition for Certiorari relies primarily on two cases for its claim that Missouri law "embod[ies] these Constitutional principles in the context of venue rights." Pet. 6. Both cases, *Glick v. Ballentine Produce, Inc.*, 396 S.W.2d 609 (Mo. 1965), *overruled on other grounds by Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo. 1995) (en banc), and *Lichterman v. Crockett,* 331 S.W.2d 607 (Mo. 1960), predate the 1976 amendments to the Judicial Article of the Missouri Constitution and, for that reason, are no longer credible interpreters of Missouri law on the procedure appropriate for claims of improper venue.

A 1965 case, *Glick* relied on MO. R. CIV. P. 55.31 (1965) (repealed). Then-Rule 55.31(a) exactly mimicked § 509.290.1. After the adoption of the previously discussed constitutional amendments in 1976, the Missouri Supreme Court separated the procedures for motions for improper venue from other motions. As noted, the former were addressed in MO. R. CIV. P. 51.045; the latter in MO. R. CIV. P. 55.27. Both rules repealed § 509.290 because the rules now "have the force and effect of law." MO. CONST. Art. V, § 5. For these reasons, *Glick*, like the Petition for Certiorari, relies on repealed law. It does not support Petitioners' cause.

A 1960 case, *Lichterman* expressly relied on § 509.290 for the proposition that motions asserting improper venue may be supported by affidavit. *Lichterman*, 331 S.W.2d at 609. The *Lichterman* analysis thus relied on the now-repealed statute, not law that applies in this case.

Lichterman is also inapposite for another reason. It relies on now-repealed law that venue in Missouri is also jurisdictional. In 1989, the General Assembly amended the

relevant statute and permitted a summons to issue "from a court in which venue is not proper. Assuming the summons is not itself defective for some other reason, proper service of that summons results in personal jurisdiction over the defendant served." *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 822 (Mo. 1994). *De Paul Health* expressly overruled cases holding that venue was jurisdictional. *Id. Lichterman* speaks of venue in its former, jurisdictional manifestation. It no longer accurately states the law on venue matters for this additional reason.

V. The Decision of the Missouri Supreme Court Does Not Conflict With Supreme Court Precedent And Does Not Violate Fundamental Fairness Principles Under the Due Process Clause of the Fourteenth Amendment Because the Supreme Court Has Not Recognized a Due Process Right to Have a Civil Matter Adjudicated in a Specific Venue.

A state's choice of acceptable venues for bringing a civil action against a defendant does not implicate the Due Process Clause of the Fourteenth Amendment.[5] Petitioners admit that they have found "no case from this Court specifically addressing the Due Process issue for defendants in the context of *civil* venue matters." Pet. 15 (emphasis in original). Courts that have addressed the civil

[5] Petitioners' claim that if the Missouri Supreme Court's decision is followed in other states, the decision necessarily threatens due process in "multiple other States" is unfounded. Pet. 14-15. As is obvious, decisions of the Missouri Supreme Court control the law in Missouri only. Moreover, Petitioners have failed to show that the other State statutes are the same as Mo. R. Civ. P. 51.045.

venue issue have determined that while the Constitution imposes constraints on the exercise of personal jurisdiction it does not impose such constraints on the location of permissible venues. *See e.g. FTC v. Jim Walter Corp.*, 651 F.2d 251, 257 (5th Cir. 1981).

This conclusion makes eminent sense. Venue decisions in a civil context do not determine any substantive rights, adjudicate any claims or result in a deprivation of life, property or liberty rights. Nor do such venue decisions threaten a defendant's right to notice and opportunity to be heard in a fair and impartial tribunal. The venue choice serves merely to select the court in which parties exercise due process rights. The venue choice does not determine any issue of substance. Recognizing this legal truth, the Supreme Court of Missouri stated: "While it is possible that Mr. Kaiser may eventually succeed on a motion for summary judgment or at trial, the ultimate substantive merits of plaintiffs' allegations as determined later in the judicial process are not relevant at this stage. The only relevant inquiry is whether the records and pleadings support a realistic belief that there is a claim against Mr. Kaiser." *State ex rel. The Doe Run Resources Corp. v. Neill*, 128 S.W.3d at 506; Pet. App. 7.

This Court has zealously enforced the guarantees of the Due Process Clause so that deprivations of life, liberty or property may not occur absent notice and opportunity to be heard. *See generally, Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and progeny. In none of those cases has civil venue been an issue.

Petitioners' cases are readily distinguishable because they are criminal cases. This Court's Due Process Clause jurisprudence as it relates to venue implicates the right to fair trial in an otherwise proper venue in a criminal

setting, not the state's venue choice itself. *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (denial of due process exists where change of venue not granted in the face of extensive pre-trial publicity); *Groppi v. Wisconsin*, 400 U.S. 505, 508, 511 (1971) (state's categorical denial of change of venue in misdemeanor cases regardless of publicity violates due process guarantees).

Petitioners have failed to show that any Due Process guarantees are implicated in a state's civil venue selection statutes.

CONCLUSION

For the foregoing reasons, Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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The Honorable Margaret M. Neill

AUGUST 2, 2004

APPENDIX OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN CASE

MO. CONST. ART. V, § 5 provides:

> § 5. Rules of practice and procedure – duty of supreme court – power of legislature. The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended in whole or in part by a law limited to the purpose.

MO. CONST. ART. V, § 27 provides in pertinent part:

> § 27. Except as otherwise provided in this article, the effective date of this article shall be January 2, 1979.
>
> . . .
>
> 20. All laws and rules inconsistent with the provisions of this article shall, on the effective date hereof, be and are repealed. . . .

MO. REV. STAT. § 508.010 (2000) provides in pertinent part:

> Suits instituted by summons shall, except as otherwise provided by law, be brought:
>
> (3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides; . . . [.]

MO. REV. STAT. § 509.290 (2000) provides in pertinent part:

> 1. The following objections and other matters may be raised by motion whether or not the same may appear from the pleadings and other papers filed in the cause: . . . (3) Improper venue; . . . 2. The grounds of any of the above may be supplied by affidavit and may be controverted by opposing affidavit. . . .

MO. R. CIV. P. 55.31 (1965) (repealed) provides in pertinent part:

> Matters That May Be Raised by Motion
>
> (a) Matters That May Be Raised. The following objections and other matter may be raised by motion whether or not the same may appear from the pleadings and other paper filed in the cause: . . . (3) Improper venue; . . . (b) Affidavits. The grounds of any of the above may be supplied by affidavit and may be controverted by opposing affidavit. . . .

MO. R. CIV. P. 55.27 (2004) deletes any reference of improper venue and provides in pertinent part:

> Defenses and Objections – How Presented – By Pleading or Motion – Motion for Judgment on the Pleadings
>
> (a) How Presented. Every defense, in law or fact, to a claim in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> (1) Lack of jurisdiction over the subject matter,
>
> (2) Lack of jurisdiction over the person,

(3) That plaintiff does not have legal capacity to sue,

(4) Insufficiency of process,

(5) Insufficiency of service of process,

(6) Failure to state a claim upon which relief can be granted,

(7) Failure to join a party under Rule 52.04,

(8) That plaintiff should furnish security for costs,

(9) That there is another action pending between the same parties for the same cause in this state,

(10) That several claims have been improperly united,

(11) That the counterclaim or cross-claim is one which cannot be properly interposed in this action.

MO.R.CIV. P. 51.045 (effective until July 2004) provides in pertinent part:

Transfer of Venue When Venue Improper

Text of rule effective until July 1, 2004.

(a) An action brought in a court where venue is improper shall be transferred to a court where venue is proper if a motion for such transfer is timely filed. Any motion to transfer venue shall be filed:

(1) Within the time allowed for responding to an adverse party's pleading, or

(2) If no responsive pleading is permitted, within thirty days after service of the last pleading.

If a motion to transfer venue is not timely filed, the issue of improper venue is waived.

(b) Within ten days after the filing of a motion to transfer for improper venue, an opposing party may file a reply denying the allegations in the motion to transfer. If a reply is filed, the court shall determine the issue.

If the issue is determined in favor of the movant or if no reply is filed, a transfer of venue shall be ordered to a court where venue is proper. When a transfer of venue is ordered, the entire civil action shall be transferred unless a separate trial has been ordered. If a separate trial is ordered, only that part of the civil action in which the movant is involved shall be transferred.

(c) A request for transfer of venue under this Rule 51.045 shall not deprive a party of the right to a change of venue under Rule 51.03 if the civil action is transferred to a county having seventy-five thousand or fewer inhabitants. A party seeking a change of venue under Rule 51.03, after transfer of venue pursuant to this Rule 51.045, shall make application therefor within the later of:

(1) The time allowed by Rule 51.03, or

(2) Ten days of being served with notice of the docketing of the civil action ~~in~~ the transferee court as provided by Rule 51.10.

(3)

No. 04-5

In The Supreme Court of the United States

THE DOE RUN RESOURCES CORPORATION,
DR ACQUISITION CORPORATION,
and MARVIN K. KAISER,

Petitioners,

vs.

THE HONORABLE MARGARET M. NEILL,
PRESIDING JUDGE, TWENTY-SECOND JUDICIAL
CIRCUIT, CITY OF ST. LOUIS, MISSOURI,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Missouri

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The statement required by United States Supreme Court Rule 29.6 has been provided in the petition for writ of certiorari and remains accurate.

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ARGUMENT

Respondent misrepresents the nature of the controlling law and the opinions below, in an effort to dissuade this Court from considering the Missouri Supreme Court's summary abrogation of Petitioners' state-created rights. Petitioners now briefly address Respondent's meritless arguments in opposition to the petition for writ of certiorari.

I. The Supreme Court Has Jurisdiction to Consider the Petition for Writ of Certiorari.

Respondent initially contests the jurisdiction of this Court to consider the instant petition under 28 U.S.C. § 1257(a). According to Respondent, there is no colorable Constitutional Due Process claim here, because Petitioners' claim was solely predicated on a now-repealed statute and thus there was no state due process right in the first instance. *See* Respondent's Brief at 1-2, 9-12.

Respondent's contention that this Court lacks jurisdiction to consider this petition is without merit. First, contrary to Respondent's assertions, Petitioners' state-created rights are not exclusively based on the statute in question, MO. REV. STAT. § 509.290. Those rights also derive from the abundant case law recognizing Petitioners' right to submit and rely upon post-petition affidavit evidence to contest venue, as well as from the Missouri Rules of Civil Procedure, which reiterate this basic procedural right to submit affidavit evidence in support of motions. *See Glick v. Ballentine Produce, Inc.*, 396 S.W.2d 609, 612-613 (Mo. 1965); *Lichterman v. Crockett*, 331 S.W.2d 607, 608-609 (Mo. 1960); *Frank v. Sinclair Ref. Co.*, 256 S.W.2d 793, 795, 799 (Mo. 1953); *State ex rel. Kyger v.*

Koehr, 831 S.W.2d 953, 956 (Mo. App. 1992) (finding pretensive joinder where defendants submitted uncontroverted affidavits in support of their post-petition motions); *Bottger v. Cheek*, 815 S.W.2d 76, 80-81 (Mo. App. 1991) (noting that non-resident can prove the alleged venue facts "are not true and cannot be proven . . . through testimony, affidavits, depositions, interrogatories, requests for admissions, or other evidence"); *Rakestraw v. Norris*, 478 S.W.2d 409, 416 (Mo. App. 1972) (holding that, in the pretensive joinder context, court must consider "the whole record – to the time the motion was heard, at least"); MO. R. CIV. P. 55.28 ("When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties. . . . "). Accordingly, Petitioners clearly have a state-created right which was summarily and arbitrarily denied by the Missouri Supreme Court, thereby giving rise to the instant Constitutional Due Process claim[1] and yielding jurisdiction for this Court over the petition.

Respondent's second premise, that the statute in question was "repealed," is false. First, there is no case that has ever held that MO. REV. STAT. § 509.290 was "repealed" by MO. R. CIV. P. 55.27. The statute remains on

[1] Respondent does not deny that procedural due process and principles of fundamental fairness under the Fourteenth Amendment to the Constitution of the United States require that an individual be given a full and fair opportunity to be heard where one's protectible liberty or property interest is at stake, *see Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917), and that, when a state supreme court denies a civil defendant the opportunity to present evidence in defense of a claim, due process is denied. *See Saunders v. Shaw*, *supra*, 244 U.S. at 320.

the books today and is as applicable today as when it first issued.

Moreover, as Respondent admits, a Missouri civil procedure rule only supersedes a procedural statute "if there is a conflict between [the Missouri Supreme] Court's rules and a statute." Respondent's Brief at 11 (quoting *State ex rel. Union Electric Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. banc 1995)). Here there is no conflict. MO. R. CIV. P. 55.27 says nothing about the use of affidavit evidence; it neither prohibits nor excludes such evidence. MO. REV. STAT. § 509.290 explicitly permits the submission of such affidavit evidence. Accordingly, the best that can be said about Rule 55.27 is that it supplements § 509.290, rather than repealing it.

Finally, § 509.290's authorization of affidavit evidence is reiterated in MO. R. CIV. P. 55.28, which Respondent totally ignores. Rule 55.28, applying to "Evidence on Motions," states that, "[w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties. . . ." *See also* Committee Note, MO. R. CIV. P. 55.28 (noting that Rule 55.28 is broader than the prior repealed Rule 55.31(b), "as it allows the use of oral testimony and depositions as well as affidavits."). Accordingly, even assuming *arguendo* that § 509.290 were somehow considered to be "repealed," Petitioners' state-created right to submit affidavit evidence in support of its improper venue motion is clearly founded in Rule 55.28, which restates the rights granted by § 509.290 and the abundant case law cited above. Thus,

Respondent's arguments against jurisdiction are without any foundation.[2]

II. Petitioners Timely and Properly Raised Their Constitutional Due Process Claim Before the Missouri Supreme Court.

Respondent further contends that Petitioners procedurally waived their Constitutional Due Process claim by raising the issue on rehearing, rather than earlier in the case. *See* Respondent's Brief at 5-8. Specifically, Respondent asserts that Petitioners "never mentioned MO. REV. STAT. § 509.290 in any paper filed with any state court," and that it is thus too late for Petitioners to assert a due process violation of a state-created right now. *Id.* at 8. Respondent additionally argues that Petitioners should have raised their due process arguments earlier, when the trial court first denied Petitioners' motion to transfer for improper venue. *Id.* at 7. Respondent's contentions are unsupported.

First, as noted above in Section I, Petitioners' state-created right to submit post-petition affidavit evidence is not based solely on § 509.290, but also derives from the Missouri Rules and case law which repeatedly recognize this right. Moreover, Respondent erroneously claims Petitioners

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[2] Respondent makes an alternative argument that the rights accorded by § 509.290 apply only to motions asserting improper venue and that Petitioners did not file such a motion. *See* Respondent's Brief at 9-10. In fact, Petitioners' motion below was a motion to transfer for improper venue. App. 58. Moreover, Petitioners' state-created right to submit affidavit evidence, as stated in MO. R. CIV. P. 55.28, applies to *all* motions, and is not limited to the context of improper venue. Thus, Respondent's arguments in this regard should be disregarded.

never cited the statute in question to the Missouri Supreme Court. In fact, Petitioners quoted the statute at length in their Motion for Rehearing and discussed the Missouri Supreme Court's own citation of that statute as justification for the submission of post-petition affidavit evidence. App. 46-47.

Petitioners' raising of the Constitutional Due Process issue in its Motion for Rehearing was well-justified, as the Missouri Supreme Court suddenly and surprisingly reversed a long-established course of accepting post-petition affidavits. Contrary to Respondent's contention, the Missouri Supreme Court did not follow "settled Missouri law," Respondent's Brief at 7, but rather ignored the multitude of cases permitting the submission of post-petition affidavits. *See Glick v. Ballentine*, *supra*, 396 S.W.2d at 612-613; *Lichterman v. Crockett*, *supra*, 331 S.W.2d at 608-609; *Frank v. Sinclair, supra*, 256 S.W.2d at 795, 799; *Kyger v. Koehr*, *supra*, 831 S.W.2d at 956; *Bottger v. Cheek*, *supra*, 815 S.W.2d at 80-81; *Rakestraw v. Norris*, *supra*, 478 S.W.2d at 416. This surprising reversal alone justifies raising the issue on rehearing. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n. 9 (1980). Additionally, there was no suggestion below that the trial court had wholly disregarded the affidavits on the sole basis that they were submitted after the amended petition was filed; the trial court merely discussed the affidavits and summarily concluded that the information available to the plaintiffs was sufficient to support a realistic belief that a valid claim against Petitioner Marvin Kaiser existed under Missouri law. App. 60, 63. Petitioners could not glean from the trial court's order that it was disregarding post-petition affidavit evidence, nor does Respondent suggest this is what the order

means. Accordingly, Petitioners' raising of the due process issue on rehearing was timely and proper.

III. The Missouri Supreme Court Summarily Disregarded Petitioners' Timely Affidavits and Their State-Created Right to Rely Upon Such Affidavits, and Thus Abrogated Petitioners' Constitutional Due Process Rights.

Respondent next suggests that "[t]he Missouri Supreme Court decision does not deny Petitioners the opportunity to present post-petition affidavits nor does it prohibit a court from considering those affidavits." Respondent's Brief at 8. Respondent further asserts that the Missouri Supreme Court actually considered the content of Petitioners' post-petition affidavits and "deemed them insufficient to rebut Plaintiffs' venue allegations." *Id.* at 9. Respondent's position finds no support in the record or the law.

In its opinion, the Missouri Supreme Court explicitly held that the "affidavits were not made until after the plaintiffs filed their petition, and, as such, were not among the information available at the time the petition was filed." App. 7 (internal quotations omitted). The Missouri Supreme Court further stated that "the information available to the plaintiffs at the time the petition was filed supported a realistic belief that a valid claim against Mr. Kaiser exists under Missouri law." *Id.* Given the Missouri Supreme Court's explicit finding that the affidavits were not to be considered in the first instance as post-petition evidence, Respondent cannot reasonably suggest that the affidavits were actually considered by the Court.

The test under Missouri law in a pretensive joinder case is not what Plaintiffs actually knew at the time of filing suit, but what information was reasonably available to them. *See State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 825 (Mo. banc 1998). As Petitioners demonstrated, the facts in the affidavits submitted here were available to Plaintiffs' counsel when they sued Petitioner Kaiser. App. 49-51. The affidavits were proper under settled Missouri law, and the Missouri Supreme Court's holding to the contrary denied due process.

Respondent's argument that the Missouri Supreme Court's holding does not deny Petitioners the opportunity to present post-petition affidavit evidence is fallacious. Granting a defendant the right to present evidence that the court will *never* consider is equivalent to denying that same defendant the right to present the evidence in the first instance. The Missouri Supreme Court decision creates this "hollow" right and should be rejected as a denial of Constitutional Due Process. *See Peck v. Jenness*, 48 U.S. 612, 623 (1849) ("A legal right without a remedy would be an anomaly in the law.").

IV. Review of the Missouri Supreme Court Decision Is Necessary to Resolve a Conflict with Supreme Court Precedent and to Address an Issue of Exceptional Importance.

Respondent lastly argues that civil venue issues are unimportant and do not warrant the protection of the Due Process Clause or the consideration of this Court. *See* Respondent's Brief at 13-15. Respondent is in error.

First, there is no question in Missouri that civil venue rights are valuable and worthy of protection. *See Lichterman*

v. Crockett, *supra*, 331 S.W.2d at 608 (noting "the valuable rights conferred upon litigants" by Missouri venue laws and further stating that it "would be a very dangerous doctrine" and "one utterly destructive" of litigants' valuable venue rights if plaintiffs were permitted to state "paper case[s]" against defendants without providing the opportunity for defendants to rebut those allegations through post-petition affidavits). This Court itself has recognized that venue has important substantive effects on case outcomes, *see Groppi v. Wisconsin*, 400 U.S. 505, 508, 511 (1971), a recognition that applies in the civil context as well as the criminal realm. Plaintiffs in the case below clearly believed venue was significant, switching their claims from one county to another, after more than six years of litigation, as described by the Missouri Court of Appeals in its opinion. App. 14-17.

More importantly, this is not a case limited to venue issues. It addresses a fundamental right – a party's right to present evidence to a court in support of a viable defense. It is uncontested that denial of a defendant's opportunity to be heard and to present evidence on a material question, even where the right is a creature of state law, operates as a wrongful deprivation of due process. *See Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974); *Saunders v. Shaw*, *supra*, 244 U.S. at 320. That is what happened here, in contravention of this Court's precedent, and it demands correction, for Petitioners' benefit and the benefit of the many civil defendants who follow.

CONCLUSION

For the foregoing reasons and those stated in the petition, Petitioners respectfully request that the Court grant this petition for a writ of certiorari.

Respectfully submitted,

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